Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 3, Original.
In Equity.

STATE OF WASHINGTON, COMPLAINANT,

v.

STATE OF OREGON, DEFENDANT.

PETITION FOR REHEARING.

Comes now the complainant, the State of Washington and petitions the court for a rehearing in the above entitled cause, and assigns the following as grounds for its petition:

I. The court erred in finding and holding that the present ship channel at the entrance to the Columbia River was the old south channel.

II. The court erred in finding and holding that the former north channel still subsisted to the northward of Sand Island, and that the boundary between the States of Washington and Oregon was to the northward of said Sand Island.

III. The court erred in not finding and holding that the present single channel at the entrance to the mouth of the Columbia River was as much the former north channel of the entrance to said river as it was the former south channel, and in not giving effect as a matter of law to the said combined single channel as the boundary between the two States.

IV. The court erred in finding and holding that the Columbia River inside the entrance was not divided by islands and in finding and holding that the testimony failed to show anything calling for consideration in respect to the ownership of the said islands.

Petitioner suggests in aid of the above and foregoing petition that it is addressed to the court in its capacity as a court of original jurisdiction, and that by rule three of this court the practice of the courts of king's bench and chancery in England are adopted as the outlines of the practice of this court in cases of original jurisdiction. In cases in chancery, under the English practice, rehearings were granted as a matter of course, on certificate signed by two counsel, the court giving such credit to the opinion of counsel who signed the petition, that the case should be reheard, as to order it to be set down for reargument.

Cunyngham *v.* Cunyngham, Amb. 91.
East India Company *v.* Boddam, 13 Ves., 423.
Attorney General *v.* Brooke, 18 Ves., 325.
Wilcox *v.* Wilcox, 1 Ired. Ch., 36.
Cotton *v.* Parker, 1 Sm. & M. Ch., 125.
Dan. Ch. Pr., 1475.

The distinction between rehearing in cases of appellate jurisdiction and those of original jurisdiction is pointed out by Mr. Justice Field in Giant Powder Company *v.* California Vigorit Powder Company, 5 Federal Reporter, 197. It is also noticed by this court in Brown *v.* Apsden, 14 Howard, 26.

It is true this court held in California *v.* Southern Pacific Company, 157 U. S., 251, that the court did not feel itself bound to follow the original English practice in king's bench and chancery, when to do so

would be to embarrass the case by unnecessary technicalities or defeat the purposes of justice, but we submit that no such result would ensue in this case from following the practice which we invoke. On the contrary, considering the narrow limits of the original jurisdiction of this court, the character of the parties who may invoke it, the importance of the questions usually at issue between them and the fact that there can be no appeal and no rehearing in any other tribunal, as was the case in England, but that litigants must stand on the single hearing had in this court, however complicated the facts, and however unfortunate parties may have been in bringing them to the intelligent apprehension of the court, it would seem that the reasons which induced the adoption of the English rule still subsist, and with added force, in cases of original jurisdiction in this court.

Passing now to a consideration of the substance of its petition, and treating the first three grounds as cognate, the State of Washington respectfully submits that there is no evidence in the case which can justify the court in treating the limited space existing today between Sand Island and the Washington shore as the "North Ship Channel" of the Oregon enabling act of 1859. That the channel to the north of Sand Island, called the North Ship Channel, ceased to exist about 1881, and the area covered by it continued to shoal until a person can now wade from Sand Island to Cape Disappointment at low tide, is the uniform testimony of all the witnesses in this case on both sides who have been interrogated on the subject.

> "After 1881 the North Channel continued to deteriorate and by 1885 had practically disappeared" (Report of Board of Engineers, U. S. Army, to the Chief of Engineers, Rec., p. 53).

The same board, summarizing the various reports concerning the several channels at the mouth of the river, say:

> "1883. . . . The North Channel had become narrower since 1881 and had shoaled to eighteen feet on the sea bar. . . . Sand Island had been pushed farther north into Baker's Bay by the main channel and the inside channel into Baker's Bay had shoaled" (Rec., p. 71).
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> "1885. . . . The North Channel had shoaled to 17 feet and moved further north, close to Cape Disappointment. It had practically disappeared, being used only by light-draft vessels from the North" (Rec., p. 71).
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> "1887, 1888. . . . No surveys or examinations were made in 1887 and 1888, but it was known from pilots and others that the North Channel had disappeared . . ." (Rec., p. 72).
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> "1889. . . . The east and west channels into Baker's Bay had shoaled to 5 feet and 10 feet, respectively, and were never afterwards used by any but light-draft vessels" (Rec., p. 72).
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> "1893. . . . Peacock Spit continued to deepen west of Cape Disappointment. The channel west of Sand Island into Baker's Bay remained of the same depth, 8 to 10 feet, and east of the island had a depth of but 4 feet" (Rec., p. 74).
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> "1894. . . . The channel west of Sand Island into Baker's Bay had continued to shoal and became narrower" (Rec., p. 74).

It is hardly necessary to multiply quotations on this point. The report of the engineers and the testimony of all the witnesses—witnesses for both parties—show conclusively that there was no ship channel and no channel of any kind north of Sand Island, inside Baker's Bay, after 1881, and that at the present time, there is not more than one foot of water in places where the State of Oregon has placed its boundary line. The universality

of this testimony makes it not worth while to quote it or refer to it by pages of the record. In reading the reports of the engineers, it is necessary to bear in mind that where they speak of the depth of channels, unless they specify the channels into Baker's Bay at the east and west ends of Sand Island, they refer to the bar channels west of Sand Island, and that the north bar channel had become connected by a cut-off through the middle sands, with the volume of water flowing south of Sand Island, and that that cut-off and bar channel still subsisted, and subsists to this day practically as the one, sole, and only channel leading from the ocean into the river. The Board of Army Engineers, consisting of Colonel Stewart, Colonel Craighill, Colonel Comstock, and Captain Powell, in their report dated October 13, 1882, made after an exhaustive investigation at the mouth of the river, explained how this cut-off occurred and its effect in maintaining the north channel as the main channel into the river. They say:

> "The depth on the shoal connecting Sand Island with the middle sands was increased from 17 feet to 19 feet in 1880 by scraping. The depth has since increased, so that in May, 1882, the main channel passing south of Sand Island crossed the shoal with 21 feet of water to the north channel and then ran into the sea, passing near Cape Disappointment, and having 19 feet of water at the sea end. Sand Island has nearly disappeared as a separate shoal, and it only needs deeper water in the main channel and the continuance of the shoaling of the south channel to make the state of affairs apparently identical with that of 1792" (Rec., p. 24).

In the same report it is observed that—

> "a correct study of the present characteristics of the river and its past history leads fairly to the conclusion that at its mouth it may be at this time approaching the conditions shown on the

> map of Van Couver of 1792, on which a single large and deep channel is indicated, with a nearly westerly direction, and it is not improbable the river would, in a few years, without the interference of man, return to that condition" (see Record, pages 25-26).

The conditions mentioned by this board continued until the building of the jetty in 1885, when they became fixed and unalterable. The south channel fluctuated, shoaling at one time and deepening at another, until the building of the jetty, when, of course, that channel was cut off and obliterated. This condition was well explained by Engineer Hegardt in his report of October 18, 1899. He there said:

> "In 1895 Clatsop and Peacock Spits attained their greatest development in elevation and area, so far as it was known up to that time, thereby, with the jetty, effectually controlling the ebb waters and concentrating them into one more defined and deeper channel across the bar, entirely sweeping away the 'Middle Sands,' and producing a direct channel from the river to the sea, whose directions was southwest, a movement of the channel at its sea end of three and one-half miles. *What was the south channel in 1885 had gradually shoaled on line with the jetty, and been entirely covered by the south spit, removing all the traces of the former channel.* The channels at both ends of Sand Island had nearly closed with an extensive decrease of depth over the whole of Baker's Bay area" (Rec., p. 42).

It will be seen from the foregoing that the former north channel, as well as the former south channel, have become obliterated, and that the one channel now connecting the river with the sea is a union of these two channels, and that if this one channel has any characteristic which identifies it with one or the other of the old channels, it is more nearly the old north channel

than it is the old south channel. It is still spoken of by some of the witnesses as the south channel because it runs to the south of Sand Island, but that condition had come to exist before the union of the two channels, when in 1881, by reason of the movement of Sand Island to the north, and the pressure of the water on the shoal between Sand Island and the Middle Sands, the volume of water formerly passing to the north of Sand Island cut a passage for itself through those shoals into the north channel, south and west of Sand Island, and thereby forever obliterated the ship channel to the north of Sand Island. The present channel can only be called the old south channel, because it runs south of Sand Island. But it may be called the old north channel because it is substantially the channel which the waters of the old north channel took when, by reason of the cut-off, they were diverted to the south of Sand Island and emptied into the sea through the cut-off. It is to be borne in mind that at that time and for many years afterwards—in fact, until the jetty cut off and obliterated the old south channel—this cut-off channel and the old south channel continued to exist side by side. In view of this undoubted history of these channels it seems to us an absolute perversion of fact, considering the matter now as one of pure fact, to call the space between present Sand Island and the Washington shore the "North Ship Channel." There is not now and never has been in all the history of these waters, so far as known, any channel of any kind through Baker's Bay where the State of Oregon has drawn its boundary line.

Considering the matter now as one of law we submit that the words "North Ship Channel" used in the act of February 14, 1859, mean something more than the mere space between Sand Island and the north shore. They mean an actual ship channel through which sea-going vessels

may enter the Columbia River from the ocean. When that channel has been closed and the waters diverted elsewhere, one of two results, we submit, follows as a matter of law. The waters which flowed through that channel, which created and constituted it, must be followed wherever they may have been diverted within the banks of the river, and must still be treated as the north ship channel; or the north ship channel must be treated as having ceased to exist, and, on the doctrine of avulsion, the boundary between Oregon and Washington must be established on the line which that channel followed in 1859.

This court has indicated some difficulties in thus treating the matter, because of the fact that Sand Island, which has shifted some three miles to the northward since 1859, and which at the latter date unquestionably belonged to Oregon, would thus be transferred to the jurisdiction of Washington. But we believe that the court, on further consideration, will not consider the difficulties insuperable.

The jurisdiction of the two States over the bed of the stream is as inviolable as that over islands built up from the bed, and yet jurisdiction over the bed may change daily with the ever-changing channel. Under the opinion as rendered, in this case, Washington is deprived of jurisdiction over a part of the bed of the Columbia River three miles in width, which has belonged to it, as State and Territory, ever since 1854. This, on the doctrine that the north channel must be followed, wherever its eccentricities may have carried it, as the bounding line between the two States. If this may be done in favor of Oregon, the existence of a slight prominence above the water, such as Sand Island, which this court in its opinion calls "little more than a sand bank" ought not to impair the doctrine when it operates in favor of Washington by the shifting of the north channel to the southward.

We do not conceive that a transfer of jurisdiction over the Island would impair the title of the Government created by the act of the Oregon legislature of October 21, 1864. If at that time an act of the legislature was necessary to vest title in the United States because the island was submerged at high tide, the island had emerged into the open at all stages of the water long before the change of the channel south of the island, and the title of the United States to it then became perfect and complete without the aid of either Oregon or Washington.

With reference to the acts of the States in granting fishing rights, or in granting fee simple titles over these shifting sands, we submit that a change of jurisdiction and sovereignty over them would not oust vested rights which were lawfully created and subsisting at the time of the change of sovereignty. These would be protected by the Constitution of the United States. We suggest, however, that any attempt by the States to fix these ephemeral obstructions for all time, by vesting title to them in private individuals, would be an encroachment on the rights of the National Government in the matter of the improvement of the Columbia River, and for that reason ought to be treated as void and ineffective. What we say in this respect applies only to the sale and conveyance of these submerged and partly submerged sands. Licenses to fish do not conflict with the paramount right of the Federal Government over the waters of the river, nor do they grant or affect to grant any greater right than the State may possess either presently or prospectively.

But there are difficulties as great, and difficulties which seem insuperable, in continuing to maintain the sovereignty of Oregon over Sand Island, wherever it may go. That island has moved three miles northward in fifty years, and is now within a quarter of a mile of the Washington shore. Undoubtedly the same influences which

have moved it that far will continue to push it north until it becomes joined to the Washington bank of the river. It will then cover tide lands to which the State of Washington has the most inviolable title, a part of which have already been sold and conveyed to private individuals. It will also cut into and interrupt the continuity of the Washington shore line and transfer to the north of the Columbia River, where the act of Congress intended that it should never be, a part of the soil of Oregon. Can all this be done consistently with the act of Congress and with the maintenance of the rights of the State of Washington? Can the action of the shifting sands of the Columbia River divest the State of Washington of title to the bed and bank of that stream, guaranteed to it by the Constitution of the United States, simply because a small fragment of those sands are above water and constituted at one time, far south of where they now exist, the southern boundary of a channel which has either ceased to exist, or, by a process analogous to that of avulsion, has become far removed from them and has now no connection with them?

We respectfully submit that unless these questions can be answered affirmatively a different conclusion must be reached than that announced in the opinion of this court.

We address ourselves now to the last ground of the petition.

This court concludes its opinion by observing that:

> "The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon. The channel is not divided by islands."

The quotation from the boundary of Oregon referred to is as follows: "And where it is divided by islands up the middle of the widest channel thereof." It is alleged

in the bill of complaint and admitted in the answer that a controversy has arisen and exists between the complainant and defendant regarding the boundary lines between said States, and that both of said States claim and assume to exercise jurisdiction over numerous islands and sands inside Columbia River, sixteen of which are enumerated by name. In the complaint and cross-bill each State respectively asserts its ownership of these islands and denies that the other has any right, title or interest therein, or sovereignty thereover. It is alleged by complainant, and admitted by defendant, that as a result of this controversy, expensive litigation has been instituted and maintained between claimants to tide lands and fishing rights in the Columbia River under grants from both States.

The first island coming into the river from the ocean is Sand Island, and the next Desdemona, and from this point up the river in that portion involved in this controversy the other islands and sands enumerated in the pleadings will be found. At this point the river is really divided by islands and the widest channel is one and one-half miles south of the line claimed by Oregon. At page 126, et seq., of the transcript will be found the testimony of the commissioner of public lands of the State of Washington, wherein, as part of his evidence, a map was introduced (Exhibit K) whereon is shown the location of all of the islands and sands in controversy and claimed to be owned by the State of Washington, and whereon is likewise shown the names of the persons holding contracts of sale or deeds from the State of Washington. An examination of this map will disclose that there are a very large number of islands and detached tide lands claimed to have been owned by the State and sold by it to citizens.

At page 185, et seq., of the record, the land commissioner, having been recalled, testified in detail concerning

the claim of ownership of the State of Washington to these islands and gave a list of the outstanding contracts of sale and deeds issued by the State of Washington to citizens, among others being to Desdemona Sands, as well as many others. It is also shown in the record that the State of Washington has collected taxes from some of these islands and detached tide lands sold by it and which are involved in this controversy. At page 142 of the record State Fish Commissioner Kershaw testified that he had issued a large number of licenses to fishermen for operating traps and other fixed appliances for fishing on these islands, and especially to fishermen on Millers Sands, Olivers Sands, Hog Back Island, Desdemona Sands, and Sands Island; that such licenses were issued by him during his term of office between 1902 and 1906. We quote the following from his testimony on page 143:

> "Mr. Van Dusen, the State Fish Commissioner of Oregon, came to me and said: 'Mr. Kershaw, we have been in the habit of getting some licenses from some of these islands, and notwithstanding they have taken out licenses from the State of Washington; it is a great hardship upon the fishermen to pay a double license, and' he says 'can't you make an agreement with me until this question is settled, you to collect from certain islands and we will collect from certain islands?' After discussing the matter and going over it with Mr. Van Dusen, I told him that during the present season I would not attempt to collect any licenses from Miller's Sands and the Hog's Back: Those are two fishing grounds up the river.
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> "Q. Did you issue any licenses in 1906 for fishermen on Desdemona Sands?
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> "A. I think so; all of them.
>
> "Q. What kind of licenses?
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> "A. Seining licenses?
>
> "Q. None others?
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> "A. Well, there were none others that we could

> definitely locate unless they would be traps; couldn't even trap. If a person makes an application to the Fish Commissioner of the State of Washington, accompained by the proper affidavit, and the fees, a license is issued which reads to fish in any of the waters of the State of Washington. The application for seines describes the ground upon which they wished to seine, the location. We have had applications for licenses the last year both on Hog's Back and Miller's Sands, but I refused to issue them under the agreement that I had with Mr. Van Dusen of the Oregon Fish Commission.

A very considerable amount of testimony was introduced involving Snag Island, the complainant contending that the boundary between the two States was through Woody Island channel which flows south of the island named, while the defendant claimed the line was north of the island (see Rec., pp. 106–7, 167, 176–7, 195). In other words, the evidence sought to show that this island was between two channels, Washington claiming the southern one and Oregon the northern as the true boundary.

In a report made by Major Hanbury to the Chief of Engineers of the United States Army, in 1891, and found on page 35 of the record, he states:

> "The main volume of water at Jim Crow Point is divided into two parts, one going down the shore and maintaining the present ship channel along that side for five miles farther down, where it crossed over to Tongue Point; the other, on being deflected from Jim Crow Point, continues in a southwesterly direction maintaining a twenty-five foot channel until Snag Island is reached."

The State engineer of Oregon prepared and introduced in evidence a map (Exhibit 8) showing the islands which had been sold by the State of Oregon up to February,

1906, all of which were in that portion of the river in controversy (Rec., p. 223). A comparison of the lands contracted to be sold or deeded by Oregon (Exhibit H) and by Washington (Exhibit K) will show that many persons have purchased the same land from both States.

The principal object in bringing this suit was to determine the boundary as to these islands in order to forever settle the controversy existing for years as to their ownership, liability for taxation, and as to which State should control the issuance of fishing licenses and the construction, operation, and maintenance of traps and other appliances which are permanently attached to the ground.

This court, in its opinion, construed the language of the Oregon enabling act of 1859 so far only as was necessary to determine which of the two ship channels at the mouth of the Columbia River was contemplated by that act. In determining the ownership of the islands and sands inside the entrance and up the river therefrom, the language of that act must be further construed. It must be remembered that the act fixes Oregon's boundary throughout the entire stretch of the river, from its mouth to a point near Fort Walla, 400 miles inland. The language fixing that boundary is—

> "thence easterly to and up the middle channel of said river, and where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla."

The words "to and up the middle channel of said river" apply where the river is not divided by islands. What meaning is to be given to the words "middle channel" in that connection? For the purpose of fixing the ship channel entrance to the river this court treated the words as meaning "easterly to and up the middle of said channel"—the North Ship Channel. We assume that the court did not mean to hold that the north ship channel continued as a northerly channel

all the way up the river as far as Fort Walla Walla. We must, therefore, look for some channel up the river without the light of the initial starting point which enabled this court to fix the north ship channel as the channel by which the Oregon line entered the Columbia River. What is meant, then, by the words "up the middle channel of said river" as applied to the river above the north ship channel? We submit that those words mean the middle of the main navigable channel of the river. Unless the court is prepared to hold that middle channel of the Columbia River means the middle thread of the river, a contention that it has always rejected where rivers or channels of rivers have been made boundary lines between States, then the construction we contend for is both proper and necessary. It can not be supposed that there are or were three or more navigable channels, or that Congress thought there were three or more navigable channels in the Columbia River extending from its mouth to a point near Fort Walla. Therefore, the words "middle channel of said river" can not be given their literal meaning. The more probable meaning, and in fact the only sensible meaning, as indicated by this court in dealing with the words as applied to the ship channels, is "the middle of the channel of said river," which, under the uniform decisions of this court in boundary cases, would mean the middle of the main navigable channel of the said river. We assume from the reasoning of this court, so far as its decision went, that that is the meaning which the court will attach to the words in question.

But the phraseology of the act of Congress changes when it comes to deal with stretches of the river which are divided by islands. There the language is "up the middle of the widest channel thereof." We submit that this language must be given the same meaning practically as that defining the line where the river is not

divided by islands. The middle of the widest channel may well be construed to mean the middle of the best channel because the best channel of a river like the Columbia will always be its widest channel. Moreover, any other construction would lead to the absurdity that, while Congress thought the main navigable channel of the river the only appropriate boundary between Oregon and Washington throughout most of its course, when it came to deal with stretches of the river in which there were islands, it jumped, without rhyme or reason, from the test of navigable channels to that of expanse of water. Why should Congress let go the well known and approved test of navigable channels at such points, to grasp at another never before adopted and, according to the decisions of this court, wholly inappropriate as a boundary between States?

It will also be necessary we conceive to determine what is meant by the word "channel."

Oregon has drawn its line arbitrarily along the north shore of the river for a distance of twenty-five miles from its mouth. Unless the term "channel," as used in the act of Congress is to be held to have no meaning, this line as drawn and claimed by it can not be maintained. What is the meaning of the word channel? Does it mean, as contended for by Oregon, apparently, an expanse of unbroken water? Or does it mean that portion of the bed of a river through which its waters flow with greater force and volume than in other parts of the river? We confidently submit that it means the latter. We submit also that the term channel implies the idea of continuity and excludes isolated pockets of deep water occurring here and there in the river.

The testimony is almost without a break that while there is deep water along the north bank of the river from the east end of Sand Island up to Knappton, a distance approximately of fifteen miles, the river is

broken up by shoals immediately above that point, and that deep-draft vessels can not now and never have been able to run above Knappton along the north shore. Where they are required for any purpose to go to Knappton and then to proceed up the river, they must, after calling at Knappton, descend the river to a point west of Desdemona Island, pass to the south of that island, and proceed on up the river by the south channel. Yet the State of Oregon has drawn its line along the north bank up to Knappton and thence still along the north bank over all the shoals and shallows, to a connection with the deep water channel several miles to the eastward. Now, we maintain that this line along the north bank can not be considered as following the widest channel of the river, unless the widest channel can be construed as synonymous with the widest stretch or widest expanse of water, which is to fly in the face of every decision of this court affirming the meaning of the term channel and explaining why the channels of rivers—the navigable channels—have been adopted as the boundaries between states; nor can it be considered as following any channel unless the idea of continuity as an attribute of channels be abandoned and every pocket of deep water encountered anywhere in the river be considered as a channel. Such pockets may indeed be channels from point to point. The stretch of deep water from Sand Island to Knappton might very well be termed a channel between those two points, but it can not, we submit, be called with any propriety, within the meaning of the act of Congress, "the middle of the channel of the Columbia River," or the "middle of the widest channel of the Columbia River."

If these contentions be sound then "the middle of the channel of the Columbia River," inside the North Ship Channel, as also "the middle of the widest

channel of the Columbia River," where it is divided by islands, are those channels claimed by the State of Washington and those channels constitute the northern boundary line of the State of Oregon. The true main navigable channel of the river from the east end of Sand Island as far up as Tongue Point, is the same today that it was in 1859. That channel after rounding Sand Island led southwesterly across to the Oregon shore, passing south of Desdemona Island, and thence up as far as Tongue Point, thus fixing Desdemona Island as belonging to the State of Washington. We challenge the most careful scrutiny of the evidence to this point and feel assured that it will sustain our contention. From Tongue Point up the river the evidence is not so uniform, but we believe that it fairly sustains us in saying that in early days the channel continued easterly up through Woody Island Channel and then cut across to the north bank in a northeasterly direction, thereby fixing Snag Island and the other islands and sands in controversy, as belonging to the State of Washington. But about 1885 the city of Portland, and later the United States Government, dredged a channel along the north bank, from Pillar Rock westward, and built a jetty across the Cordell Channel at Snag Island. This diverted the water of the river from its old channel to the new, as it was intended to do, and since that time the main channel has flowed down the north bank to a point nearly opposite Tongue Point and thence across the river bed to Tongue Point. But from Tongue Point west to the north ship channel there never has been but the one main navigable channel of the river. How far the action of the public authorities in diverting the main channel of the river from the south to the north shore can have influence in affecting the title of the State of Washington to the islands and sands which before were north of the main channel, and have since been south of it, is a question which this court must decide.

No such question, however, can arise with reference to Desdemona Island. That island, we repeat, has always been and is to this day north of the main navigable channel of the river and on the Washington side of that channel.

Upon the questions of fact referred to above we cite:

Testimony of G. B. Hegart, Rec., pp. 97, 100, 101, 103, 106, 107, 108, 116, 117.

Testimony of Edmund Jussen, Rec., pp. 159 to 167, both inclusive.

Testimony of Capt. Cleveland Rockwell, Rec., pp. 209, 210, and 211.

Testimony of Capt. P. E. Ferchen, Rec., pp. 232, 233, 234.

Testimony of Capt. M. D. Staples, Rec., pp. 241, 242, 243, 244.

Testimony of Capt. A. C. Fisher, Rec., pp. 256, 257, and 558.

Testimony of Capt. P. Jordan, Rec., pp. 263, 264, 265.

Testimony of Capt. John Pickernell, Rec., pp. 268, 269, 270.

Testimony of E. A. Beard, Rec., pp. 312, 313.

Testimony of Capt. Geo. Warren Wood, Rec., pp. 326, 335, 341.

Testimony of Capt. S. D. Adair, Rec., pp. 437.

Testimony of Capt. John Welch, Rec., pp. 440, 441, 442.

The points in the river to which we have referred, or to which witnesses have referred, will all be found on the maps attached to the opinion of the court or on the maps attached by the parties to the bill and answer respectively, and we have not deemed it necessary to reproduce those maps here.

We deem it proper to say in this connection, however,

that the map referred to in the opinion as Chart A, is the reproduction of a colored map which, so far as we can ascertain, never was introduced in evidence, but was simply used by counsel for the defendant to illustrate his argument. The original of this map can not now be found among the files in the case. We are informed that it was withdrawn by counsel for the reason that it was not an exhibit in the case. In some particulars the map is misleading. In the first place it does not show the hydrography of the river from the survey made nearest to the admission of Oregon. The hydrography is that of a survey made in 1850 and published in 1851, while the survey of 1852, published in 1854, was that nearest to the date of Oregon's admission. Among other differences between the maps of 1851 and 1854 are these: On the map of 1851 as to the north channel the distance of the bar at midchannel from the middle line connecting Cape Disappointment and Point Adams, was west two miles, north half mile, while on the map of 1854 it was west three miles, south one-half mile. In the map of 1851 as to the south channel, the distance of the bar at midchannel from the middle of a line connecting Cape Disappointment and Point Adams was three and one-half miles and south one and one-half miles, while on the map of 1854 such distance was west one and one-half miles and south three and one-half miles (see page 31 of record).

We beg to say in conclusion that we do not controvert the general propositions of law laid down by this court in its opinion but accept the same. We insist, however, that a misconception of the facts of the case has led to an erroneous application of those principles in the sole matter decided by the court, and has led the court to pass over without decision important questions at issue, concerning which there is ample testimony, and the determination of which is essential to a complete settlement

of the controversy submitted. For these reasons we submit that it is necessary to reopen the case and permit a reargument of the same, and we respectfully ask the court to make an order accordingly.

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E. C. MACDONALD,
Solicitors and Counsel for Complainant.

W. P. BELL,
Attorney-General,
S. H. PILES,
Of Counsel.

The undersigned conceive that the above entitled cause is one proper to be reheard, and they so certify.

GEORGE TURNER,
E. C. MACDONALD,
Solicitors and Counsel for Complainant.

Supreme Court of the United States

OCTOBER TERM, 1908

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v.

STATE OF OREGON, Defendant

BRIEF AND ARGUMENT OF COMPLAINANT IN SUPPORT OF PETITION FOR REHEARING

FIRST

While the petition for re-hearing accepts the decision of this court to the effect that the north ship channel of the Columbia river is the channel fixed by the act of Congress as the north boundary of the State of Oregon,

counsel for complainant, on further reflection and with all deference, beg leave to present some considerations which in their judgment make against the correctness of that decision, in the hope that the court may see fit to reverse it.

It is necessary, we conceive, in discussing the subject, to determine the initial starting point of the Oregon line. According to the Oregon enabling act that point must be "due west and opposite the middle of the north ship channel of the Columbia river." Does this language mean due west of that channel at a point where the channel's flow crosses a line drawn from Point Adams to Cape Disappointment, which is assumed to be the mouth of the river, or does it mean due west and opposite that channel at its mouth or sea end? Oregon claims the former, and Washington claims the latter.

The sea end of the north channel in 1851 and 1854 was within three miles of the mouth of the Columbia river. See abstract, U. S. Coast Survey Charts, 1851 and 1854; record p. 68. It was then within territorial waters, and if that channel was to be employed through any part of its course as a boundary between Oregon and the prospective State of Washington to the north, it was as important that it be thus employed from its sea end to its entrance into the river proper, as it was

that it be employed inside the entrance. The same local territorial jurisdiction, with some unimportant qualifications, would exist over it out to the three mile limit as would exist over it within the river banks, and the same policy which would make the channel inside the river banks the boundary would require the channel to be continued as the boundary out to its sea end. This seems clear. The policy to which we refer is that laid down by this court in the case of Iowa v. Illinois, 147, U. S. 1-13, where, in the language of Mr. Justice Field, it is said: "We are of opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river."

This policy would be given full effect by establishing the initial starting point for the line west and opposite the sea end of the channel, because then the middle of the channel could be followed throughout its entire course. But to establish it where Oregon has claimed it, would be to make the line run, ignoring any channel, from a point almost due west of the south end of Cape Disappointment easterly across Peacock Spit, to the middle of the north channel inside the river banks, a course which no ship ever followed or ever could follow in all the history of the river. A vessel starting at Oregon's initial point, in order to reach the

point where her line as drawn first intersects the north channel, would be required to sail three miles south in order to find the beginning of the north channel or even to get into it: because Peacock Spit extends that far south from Cape Disappointment, and cuts off from the initial point any direct approach to the channel or to the river. Moreover, when Oregon's initial point has been established, the law requires the line to extend "thence easterly," etc. The result would be if that point be established as claimed by Oregon, all the north ship channel outside the mouth of that river would be thrown to the south of the Oregon line, and her jurisdiction over it fixed to the exclusion of the then Territory and now State of Washington. Oregon, acting on this view, has so drawn her line, as will be seen by an examination of any of the maps on which that line has been placed. Did Congress intend a thing so inequitable to the prospective state to the north, so contrary to the policy which induces the adoption of navigable channels as the boundary line between states? We do not believe so. On the contrary we submit that in fixing Oregon's north boundary Congress had in mind as well the south boundary of the future State of Washington, and that it did not intend that the jurisdiction of Oregon should extend, within the three mile limit, over the northern channel in its entirety. Yet that would unquestionably be the result

of establishing the commencement of her line where Oregon claims it. Since, then, the sea extremity of the north channel was within the three mile limit, a fact that Congress must have known, and since the contention of Oregon as to the commencement of the line, if allowed, would throw all of said north channel outside the banks of the river, into Oregon's territory, and give her exclusive jurisdiction over it, a condition that it cannot be supposed Congress intended, we insist that Oregon's contention as to the initial point must be overruled and that point fixed where Washington has placed it.

It is important in this case to have the true initial point for the line established, even if Oregon's contention be upheld that the line follows the north channel, because upon the establishment of that point depends the question whether Oregon is to have jurisdiction over that channel from its commencement to its entrance into the river, to the exclusion of Washington.

But it is important also to fix that point for the purpose of determining whether the line is in fact to follow the north channel, and on that subject we say: If the true initial point be west and opposite the middle of the north ship channel at its sea end, it is impossible for the line to follow up the north channel consistently

with the law, which requires that the line shall extend "thence easterly to and up the middle channel of said river," etc. The word "easterly" qualifies both the words "to" and "up," so that the line would extend easterly to the middle channel and also easterly up the said middle channel. But the north channel does not extend easterly from its sea end. It has an almost due north direction, and that makes it impossible to extend the line up that channel and observe the calls of the law. This constitutes one cogent reason against the conclusion reached in this case that the words, "thence easterly to and up the middle channel of said river," mean "thence easterly to and up the middle of said channel" (the north channel).

Another and equally cogent reason against giving those words such meaning is that the Oregon line must follow as far as Fort Walla Walla whatever channel is found to be the true channel, the language of the law being "thence easterly to and up the middle channel of said river, * * * to a point near Fort Walla Walla." Fort Walla Walla is 400 miles inland, and it is not true in fact nor can it be presumed, that the north ship channel extends as a continuous channel that far up the river.

These considerations appear to us to present an insuperable obstacle to the adoption of the north

channel as the channel whereby the Oregon line enters the Columbia river or as the channel which it follows after it enters the river. We submit, as the only permissible construction of the law, that the line commences due west and opposite the middle of the north ship channel at its sea end, and that it extends thence easterly to the middle channel of the river inside the mouth of the river. A glance at Chart A, attached to the opinion of the court, will show that such a line would divide the river mouth almost equally between Oregon and Washington and give each of them, in 1859, an equally good ship channel into the river, considerations which it may be presumed would have moved Congress. The designation of such a line would also provide an explicable rule for continuing the dividing line up the river to Fort Walla Walla. The term, "middle channel," as used in the law, is not materially different in meaning from the term, "mid-channel," which latter term we are told by Mr. Justice Field in Iowa v. Illinois, *supra,* is used interchangeably in international law with the term "middle of the river," "middle of the main channel," "the deepest channel of the river," etc. The line we contend for, starting from the point we contend for, would not strike or follow any channel until it reached the mouth of the river proper, but would cut across the middle sands, which is an objection to it; but it is not

more objectionable in that respect than the line contended for by Oregon, starting from the point it contends for, which, likewise does not follow any channel until it reaches the mouth of the river and which cuts across Peacock Spit in order to reach that point. Considerations of reason and propriety, addressing themselves to Congress, would all move the adoption of a line such as that we now contend for rather than the Oregon line, and we may add that the language of the law as actually passed by Congress agrees with that line in every particular and cannot be made to agree with the Oregon line in any particular.

We think the line established by the act of March 2nd, 1853 (10 Statutes at Large, p. 122), for the southern boundary of the Territory of Washington sheds considerable light on these questions. The two acts of Congress are to be construed in *pari materia*. In Buttenuth v. St. Louis Bridge Company, 123 Illinois, 535, a case quoted from by the court with approval in Iowa v. Illinois, *supra*, the acts establishing the boundaries of the several states east and west of the Mississippi were so considered. The act of 1853 establishes the southern line for Washington Territory thus: "All that portion of Oregon lying and being south of the 49th degree of north latitude, and north of the middle of the main channel of the Columbia

river, from its mouth to where the 46th degree of north latitude crosses said river, near Fort Walla Walla."

This law fixes the middle of the main channel of the river as the boundary line between the two territories and we submit that it cannot be supposed that Congress, when it came to establish the line of the State of Oregon later, intended to depart from the middle of the main channel, especially as we find that "middle channel" as used in the Oregon law is synonymous with "middle of the main channel" as used in the Washington law, and that the right of states divided by a river to each reach the main channel, a channel of commerce, has been deemed so important, as stated in Buttenuth v. St. Louis Bridge Company, *supra,* as "to be embraced in all treaties, cessions, ordinances, statutes and constitutions, made, enacted or adopted in regard to the Mississippi river, since the Federal Government was organized."

Of course, if the act of Congress had specifically designated the north channel as the boundary, that would end the discussion. But it did not do so. It designated the middle channel as such boundary. This court makes the middle channel the north channel by interpolating the words, "of said" between the words "middle" and "channel" so as to make the law read "the middle of said channel," on the theory that it

would hardly be expected that the law would locate the starting point in the ocean opposite the middle of one channel and then run the boundary up the middle of another channel. But since in the contention of Oregon, it is not proposed, because it is not possible, to run the line from its initial starting point up any channel, the reason of the court fails. Their line does not strike any channel until it gets into the river proper; nor does the Washington line here contended for. If the line commences where we insist that it does, and if it be extended thence easterly as the law requires, it will naturally strike the middle or mid-channel, and not the north channel, when it gets inside the river's mouth. The reason for locating the starting point opposite the mouth of the north channel is explicable, not on the theory that the line was to follow that channel up, because it cannot do so on any theory of law or fact, but on the theory that the mouth of that channel was easily determined by the hydrographers of that day and that it constituted a point mid-way the mouth of the river from whence a line could be extended easterly and strike the middle channel of the river, which middle channel the law in terms, and the reason of the law as explained by this court, makes the true dividing line.

The Washington Territory act is also particular to

specify the middle of the main channel of the river as the boundary "from its mouth to where the 46th degree of north latitude crosses said river, near Fort Walla Walla." Now whether the mouth of the river be at the sea end of the main channel or whether it be at the point where the river crosses a line from Point Adams to Cape Disappointment, the line according to the Washington law is to extend along the middle of the main channel, and not along the north channel. Is not the Oregon law, construed in the light of the consideration here adverted to, more nearly in keeping with the directions of the Washington law than with the untenable theory of the State of Oregon? And if there be obscurities in the Oregon law, are they not made plain by a resort to the unambiguous terms of the Washington law?

The act of Oregon, of October 21st, 1864, ceding Sand Island to the United States, may show the understanding of Oregon that her line ran to the northward of Sand Island, but it does not, we submit, show any such understanding on the part of the United States. The Oregon cession was never accepted by an act of Congress, and there is no official of the government outside the Judicial Department, qualified to fix by his action, the meaning of an act of Congress. No doubt some official of the government, looking into the law and

finding it obscure, thought it wise to get a cession of Sand Island from Oregon. Such a transaction, we submit, ought not to be given effect as a solemn construction by the government of the United States of a law fixing the boundary between two sovereign states. Even if the act of such an official be given effect as the act of the government, it would have much the same complexion as the act of an owner of real estate who thought it wise to procure quit-claim deeds to his property from every person having even a shadow of title. Such action would show that there was doubt in the mind of the owner concerning his title, but it could not be fairly urged against him as an authoritative declaration that he had no title whatever.

We are not sure, in view of the points made in our petition for a rehearing, that we have a right to urge a reconsideration of the decision of the court on the point we have been discussing. But should a rehearing be granted on any ground, we assume that all questions will be opened up for reargument, and we have thought it permissible in view of that fact, to discuss here, although the point is not taken in our petition, the correctness of the holding that the north channel was the one designated by the law as the north boundary of the State of Oregon.

SECOND

But if the north channel be in truth the channel contemplated by the law as the boundary, then we say here, as we urged in our petition for a rehearing, that the north ship channel inside the river, that is, the channel to the north and east of Sand Island, ceased to exist about the year 1881, or sooner; that the volume of water formerly passing through that channel and constituting it, cut a new channel for itself through the middle sands south of Sand Island, and that this new channel then became in fact, as well as in law, the north channel of the river.

Upon questions of fact concerning the mouth of the river and the several channels of the river, both at the mouth and above the mouth, we submit that the reports of United States engineer officers, whose duty it was to make careful observations and measurements, and whose reports to their superiors and to Congress were made pursuant law, are better evidence and more conclusive evidence than the mere casual observations of individuals whose occupations have made them more or less familiar with the river.

We refer to the reports of the engineers or Boards of Engineers, in the order of their date, and extract from them the following statements bearing on our contention:

"A comparison of this examination with the survey of 1881 shows that Clatsop Spit has changed but little, if any, in position or extent. The southern side of Sand Island has about the same position, but the northern point has made out considerably further into Baker's Bay. The "cut-off" channel between the old south channel and the north channel has widened and deepened, and shows a least depth at mean low-water of 21 feet. The middle sands have made to the northward throwing the north channel to the north, and Peacock Spit has made to the eastward. The north channel shows a least depth of 19 feet at mean low-water. The south channel is about the same as last year, full of lumps, with 15 to 17 feet of water on them.

A thorough examination was made of that part of the middle sands between the north and the south channels where the survey of last year indicated that there was a disposition for the ebb-currents to break through and open a new and straight channel. The cutting out at this locality has continued, and now there is a straight channel over the sands with a least depth of 17 feet. The distance between the 18 foot curves in passing through this channel is one-quarter of a mile, and between the 24 foot curves is one-and-one-half miles. There is one lump with a least depth of 17 feet, one-quarter of a mile to the eastward and detached from the general 17 foot shoal. The tug was allowed to drift from the deep water off Clatsop Spit buoy when the tide was about half-ebb, and the result shows that ebb-currents set directly through this channel with great force. The bottom is hard sand. It was therefore selected as the proper place to scrape, and on the 28th of May three buoys were placed by the Shubrick, the lighthouse tender, as guides for the scraping."

Report of Examination of Bar, Mouth of Columbia River, by Lieut. P. M. Price, Corps of Engineers, dated May 31st, 1882. Record p. 33.

> "In 1841 there were channels giving 30 feet of water on the north and 27 feet south of Sand Island. As Sand Island moved north, the channel was gradually closed, so that now but 13 feet can be carried around its northern side. In 1839 and 1841 these channels joined west of Sand Island, thus giving a single main channel thence to the sea, with 27 feet of water. But in 1852 the minor channel shown in the survey of 1839, crossing Clatsop Spit, which extended five and one-half miles west from Point Adams, had become a wide southerly channel three miles west from Clatsop Beach, with 21 feet of water, there still being 27 feet in the sea end of the main or north channel. The part of Clatsop Spit thus cut off formed the middle sands, which in 1850 had already become continuous with the Sand Island shoals, so that from the east of Sand Island two channels ran to the sea, separated by a shoal facing west-northwest, and six miles long."

Report of Board of Engineers for the Permanent Improvement of the Mouth of the Columbia River, consisting of Lieut. Col. C. Seaforth Stewart, Lieut. Col. Wm. P. Craighill, Lieut. Col. C. B. Comstock, and Capt. Charles F. Powell, dated October 13th, 1882. Record p. 23.

> "The depth on the shoal connecting Sand Island with the middle sands was increased from 17 to 19 feet in 1880 by scraping. This depth has since

increased, so that in May, 1882, the main channel passing south of Sand Island crossed the shoal with 21 feet of water to the north channel, and then ran into the sea, passing near Cape Disappointment and having 19 feet of water at its sea end. Sand Island has nearly disappeared as a separate shoal and it only needs deeper water in the main channel and the continuance of the shoaling of the south channel to make the state of affairs apparently identical with that in 1792."

Report of same Board. Record p. 24.

"It is to be observed also, that Cape Disappointment is fixed, and its attached spit, the Peacock Spit, has been persistent. On the contrary the position of Point Adams, unlike Cape Disappointment, has been quite unstable. Its attached spit, the Clatsop, has also varied greatly in extent and position. Moreover, while the south channel was for a short time the best entrance, the characteristics of permanence and excellence have belonged more constantly to the northern.

"These facts are mentioned as indicating the propriety of sacrificing, as some would call it, the possibility of the formation of a good south channel, to the reasonable certainty of producing and maintaining one good channel in the northern position.

"A careful study of the present characteristics of the river and its past history, leads fairly to the conclusion that at its mouth it may be at this time approaching the condition shown on the map of Vancouver of 1792, on which a single large and deep channel is indicated, with a nearly westerly direction; and it is not improbable the river would in a few years, without the interference of man, return to that condition."

Report of same Board. Record pp. 25 and 26.

"In 1868 much of Clatsop Spit was out of water, and there was a south channel with 25 feet in it. It might be hoped then, that a work which should only aim to raise Clatsop Spit above low water would again leave the conditions of 1868 with a good south channel. The Board does not feel any confidence in such a result, nor in its permanence should it occur. Such a work would tend to throw the ebb-current toward Cape Disappointment, and in this respect would perhaps in part produce the effects expected from the jetty proposed by the Board but in a less effective way. Should the jetty of the Board, when extended to the northern edge of Clatsop Spit, produce the depth of water in the north channel aimed at, viz., 30 feet at low water, no engineer would think of carrying the jetty farther."

Report of same Board. Record pp. 28 and 29.

"Condition of Channel, 1885 and 1895.—Having briefly noted the commencement, progress, and completion of the jetty, with its present condition, a comparison of the survey of 1885 (Pl. I) and 1895 (Pl. II), showing the conditions of the channels and shoals of the entrance to the Columbia river prevailing at the time of commencement and completion of the jetty, will be taken up: In 1885 the north channel had practically disappeared, leaving the south channel the only one to be used by vessels of deep draft. The direction of the channel at its sea end was east by south. Over these "middle sands," lying between the north and south channels, the depth of water was from 10 to 12 feet. In the "cut-off" channel leading to Baker's Bay anchorage the depth was 14 feet in a narrow channel, while at the upper end of Sand Island the channel depth was only 8 feet.

"The area of Peacock Spit was less than in 1881, but showed a small portion of it bare at low

water. Clatsop Spit had gained more or less in all directions and the depth of water over it continued to increase from 1868 to 1885, when it was the greatest shown on any of the charts, with a swash channel, "Tillamook Chute," running almost across it. Over the inner bar, across the mouth of the south or main ship channel off the river, there was only 19 feet of water. In 1895 Clatsop and Peacock Spits attained their greatest development in both elevation and area, so far as it was known up to that time, thereby, with the jetty, effectually controlling the ebb-waters and concentrating them into one more defined and deeper channel across the bar, entirely sweeping away the "middle sands" and producing a direct channel from the river to the sea, whose direction was southwest, a movement of the channel at its sea end of three and one-half miles. What was the south channel in 1885 had gradually shoaled up on line with the jetty and been entirely covered by the south spit, removing all traces of the former channel. The channels at both ends of Sand Island had nearly closed with an extensive decrease of depth over the whole of Baker's Bar area.

"Sand Island, as a whole, had undergone few changes in its positions, considering the decided changes which had occurred elsewhere during this period of ten years. The inner bar had been entirely removed, increasing the depth there from 19 feet to 32 feet, a greater gain in depth than was effected on the outer bar. Clatsop Spit, from having over it an average depth of about 6 feet, increased in elevation so as to be, over a large portion of it, 6 to 8 feet above low water."

Report of Mr. G. B. Hegardt, Assistant Engineer, dated October 14, 1899. Record pp. 41 and 42.

"After 1881 the north channel continued to

deteriorate and by 1885 it had practically disappeared. Since that time there has been but one channel, the old south channel, which retained without material change its location and depth across the southwest section of the bar until 1889. Clatsop Spit continued to grow to the north and west until even a later date, but lost in elevation until reinforced by the construction of the jetty. Its most marked development was the appearance in or before 1881 of a new swash channel near Point Adams, which continued to grow in width and depth until after 1885 and promised, if not checked, to develop into a new south channel similar to that of 1839. Sand Island and the channel north of Clatsop Spit were pushed farther north, and this movement continued until the sand movement on Clatsop Spit was controlled by the construction of the jetty designed by the Board of 1882. The middle sands as an appendage to Sand Island disappeared, but remained as the outer crest of the bar and a barrier directly across the entrance. Peacock Spit to 1889 gradually shortened in a north and south direction, but grew extensively to the southwest along the crest of the bar. Baker's Bay became an area of shoals and had so continued to the present time."

Report of Board of Engineers on Project for Improvement of Mouth of Columbia River, dated January 24th, 1903. Record pp. 53 and 54.

Attached to the last report quoted from is an appendix giving the substance of former reports on the mouth of the river and we extract from that appendix the following:

"1851. United States Coast Survey Chart. * * * The bar is shown upon this chart in the

north channel half way up its length to Cape Disappointment and one mile westward of the line connecting Cape Disappointment and Point Adams, with a best depth of 27 feet. * * * ."

"1854. United States Coast Survey Chart.—This chart was published in 1854 with the hydrography of 1852. Two distinct and separate entrances are shown to exist—one from the westward, three miles south of Cape Disappointment, and the other from the southward, three and one-half miles southwest of Point Adams, caused by the middle sands, which extend from north to south across the mouth of the river.

"The outer bar is shown at the entrance of the north channel three statute miles from the line connecting Cape Disappointment with Point Adams. Twenty-seven feet may be carried through the channel, with good depths of water, to Baker's Bay anchorage. The channel northeast of the middle sands from the bay to the river carries 21 feet. The better entrance into the river is now through the south channel, where, after crossing a narrow bar with 21 feet of water upon it, a channel nearly one mile wide, with good depths, is open. From the entrance the channel runs three miles to northward, and thence eastward to deep water of the river.

"1868. United States Coast Survey Chart.—This chart was published in 1874, with the hydrography of 1868, and shows a north channel between Peacock Spit and the middle sands. The entrance of it is three miles southwest of Cape Disappointment, where a depth of 21 feet may be carried over the bar into Baker's Bay. At the junction of this channel with the main one of the river 21 feet exist (Chinook Channel).

"The south channel opens from the southward with an entrance two miles wide, its central line lying four miles west of Point Adams. Depths

not greater than 25 feet may be carried into the deeper water of the river.

"1876. United States Engineer Survey, Assistant Engineer Jessen.—Twenty-two feet may be carried over the outer bar of the north channel, three miles west of line from Cape Disappointment to Point Adams, with good depths to Baker's Bay.

"The Chinook Spit channel bar shows best depths of from 13 to 19 feet.

"The south channel has least depths of 2.0 feet at its entrance.

"1878. United States Engineer Survey, Lieut. Payson.—The outer bar near the entrance of the north channel, distant three miles from the line of Cape Disappointment and Point Adams, shows greatest depths of 23 feet, which may be carried over it to deeper water of Baker's Bay. The bar in Chinook Spit channel has depths from 15 to 17 feet. The entrance to the river is by the south channel, which shows at its mouth a narrow opening of 20 feet depth.

"1879. United States Engineer Survey, Assistant Engineer Jessen.—The outer bar at the entrance to the north channel is distant from the reference line heretofore taken five miles. Twenty-three feet can be carried over this bar into Baker's Bay.

"Chinook Spit channel is still shoaling. It was scraped during the year, but without any decided gain of depth. Its bar shows channel depths from 14 to 15 feet.

"The entrance to the main river channel is by the south channel, three and one-half miles due west of Point Adams. Depths of 20 feet only can be carried through this channel.

"1880. United States Engineer Survey, Assistant Engineer Jessen.—The outer bar at the entrance of the north channel is distant from the

reference line two and one-half miles. Depths of 21 feet may be carried over it into Baker's Bay.

"The bar in Chinook Spit channel extends along the entire eastern border of Sand Island. The channel depths upon it vary from 14 to 15 feet.

"The middle sands hinged to Sand Island show a gradual deepening at a point one and one-fourth miles due south from Cape Disappointment, where a bar less than one-fourth of a mile in width may be crossed with from 17 to 18 feet of water upon it. The surveys of 1878 and 1879 show this severance between Sand Island and the middle sands to have been gradually increasing.

"The former survey shows this bar to have been a little over and the latter a little less than one-half mile in width. The narrow ridge was scraped this year with favorable result. This connection between the main channels is called the cut-off.

"Nineteen feet is the best water over the bar of the south channel.

"1881. United States Engineer Survey, Lieut. Price.—The outer bar near the entrance to the north channel is distant two miles from the reference line.

"Twenty feet of water is stated in the report of the survey to be the best depth which can be carried over the bar to Baker's Bay.

"The severance (cut-off) between the middle sands and Sand Island has now the shape of a short narrow channel, 20 feet in depth, connecting the north and south channels.

"The bar in Chinook Spit channel has been filled to depths from 12 to 13 feet.

"The entrance to the south channel has been gradually shoaling with formation of lumps. The depths found here are from 17 to 19 feet.

"The passage to the river is now made by crossing the bar of the north channel, thence by this channel two and one-half miles in a southeasterly direction to the cut-off, crossing at that point to

the south channel and the deeper water of the river.

"1882. United States Engineer Examination, Lieut. Price.—Best depths on outer bar near mouth of north channel are 19 feet.

"The cut-off shows depths of 22 feet, with a good channel of 21 feet.

"The south channel has been virtually closed to deep draft vessels by many lumpy formations at its entrance. Depths varying from 15 to 17 feet only are found here.

"The soundings were reduced to the plane of the lower low waters.

"The minor channel across the middle sands, about half way between the north and south channels, whose formation was first noticed in 1879, has now a depth of 17 feet on a straight line. An unsuccessful attempt was made to deepen this new channel by stirring up the bottom with large harrows.

"1883. United States Engineer Survey, Asst. Engineer Von Geldern.—This survey included a development of Clatsop and Peacock Spits, and soundings in Baker's Bay.

"The north channel has become narrower since 1881 and had shoaled to 18 feet on the sea bar. It had also moved three-fourths mile to the north into an almost northwesterly direction.

"The south channel had become the ship channel and had worked three-fourths mile nearer Clatsop Spit to an almost due south direction. There has been a general increase in depth to 20 or 21 feet, with lumps having a depth of 18 or 19 feet.

"Tillamook Chute, the swash channel across Clatsop Spit, whose existence was known in 1881 but not shown on chart of that year, had increased in importance and moved to the north. It carried 12 feet nearly across the spit.

"The Fort Stevens bar had about the same depth on it as in 1881, 20 feet.

"Sand Island had been pushed farther north into Baker's Bay by the main channel and the inside channel into Baker's Bay had shoaled.

"The cut-off channel into Baker's Bay west of Sand Island showed tendencies toward shoaling. Peacock Spit was shoaling at its inner end and extending toward Sand Island.

"1885. United States Engineer Survey, Lieut. Burr.—A complete survey of the channels, spits, and Baker's Bay from Fort Stevens to the sea. The south channel was the only one used by deep draft ships. Its depth, 20 feet, and location were essentially the same as in 1883, the movement toward Clatsop Spit having been only one-fourth mile. There were fewer lumps in the channel.

"The north channel had shoaled to 17 feet and moved farther north, close to Cape Disappointment. It had practically disappeared, being used only by light draft vessels from the north.

"The Fort Stevens bar had shoaled to 19 feet.

"Tillamook Chute had moved northwest, 1,500 feet, and while it had not increased in area it had increased in depth. Clatsop Spit had gained in depth outside the 6 foot contour and had extended in all directions, most markedly toward the west.

"The northward movement of the main channel continued and Sand Island moved correspondingly into Baker's Bay. Baker's Bay had not shoaled materially. The inside channel east of Sand Island had shoaled to 8 feet from the 16 foot depth of 1881, and the cut-off channel to 14 feet from 2[illegible] feet in 1881.

"Peacock Spit had shoaled in all directions joining onto Sand Island on the east and the middle sands on the west. A breach had been made through Sand Island at the elbow.

"The depth on the middle sands had increased generally, and on the southwest quadrant of the bar the sea slope had moved seaward noticeably.

"Preliminary steps were taken for beginning the construction of the jetty across Clatsop Spit.

"1886. United States Engineer Examination.—A survey of the ship channel and Clatsop Spit.

"The south channel had continued to lengthen by shifting toward the southeast, its depth and width remaining about the same as in 1885.

"Tillamook Chute had not deepened but the river end had widened and moved toward the end of the spit.

"Work upon the shore end of the jetty was under way.

"1887 and 1888.—No surveys or examinations were made in 1887 and 1888, but it was known from pilots and others that the north channel had disappeared and that the south channel had practically the same depth and location as in 1886. Peacock Spit had joined completely to the middle sands, over which the depth was about the same as in 1885.

"The construction of the jetty had extended to a length of about one-half mile by August, 1886, but had not shown any effect upon the channels.

"1889. United States Engineer Survey, Asst Engineer Clapp, in September and October.—A complete survey of the channels, spits, and Baker's Bay from Fort Stevens to the sea, made near the end of the working season.

"At the time the survey was made the jetty had reached a length of about two and one-half miles, nearly all of which had been raised to or near low water level.

"Earlier in the season the channel was reported as having a tendency toward a straight course out to sea, and marked changes were evident in Clatsop Spit, which showed much more area bare at low water.

"At the time the 1889 survey was made the condition of the channels and spits was as follows:

"The entire southwest quadrant of the bar had

deepened to 20 and 22 feet, with many lumps of 19 feet, but only a few less than 19 feet. Several 20 to 21 foot channels existed, the buoyed channel running out southwest to the sea about two miles northwest of the 1885 channel. The middle sands had thus practically disappeared.

"The sea slope of the bar moved seaward along its westward face. From the 1889 channel line south along the face of Clatsop Spit there was a marked recession of the sea slope, and in the northwest section there was a similar recession of less extent.

"Peacock Spit showed a remarkable development, having shoaled to depths of about five feet for a distance of nearly two and one-half miles from Cape Disappointment. At this time it had in this direction its greatest known development in height.

"The east and west channels into Baker's Bay had shoaled to 5 feet and 10 feet, respectively, and were never afterward used by any but light draft vessels.

"The northward movement of the main channel had continued, carrying Sand Island farther into Baker's Bay."

Record pp. 68-69-70-71 and 72.

One thing is to be kept in mind in reading these reports and we call special attention to it lest they mislead, and that is that where the engineers speak of north and south channels, their deepening or shoaling, or opening and closing, and their disappearance, they refer to the bar channels outside the entrance to the river. Wherever they refer to channels in the river they specify them. For instance, in the report of 1854

it is said, "27 feet may be carried through the channel, with good depth of water, to Baker's Bay anchorage. The channel northeast of the middle sands, from the bay (Baker's Bay) to the river carry 21 feet."

Again in the report of 1868, "the entrance of it (the north channel) is three miles southwest of Cape Disappointment, where a depth of 21 feet may be carried over the bar into Baker's Bay. At the junction of this channel with the main one of the river 21 feet exists (Chinook Channel)." The inside river channel north of Sand Island, is here spoken of as it is in later reports as the "Chinook Channel," because it is confined between Sand Island and Chinook Spit, the latter making out from the Washington shore.

In the report of 1876 it is said, "22 feet may be carried over the outer bar of the north channel, three miles west of line from Cape Disappointment to Point Adams, with good depth in Baker's Bay. The Chinook Spit channel bar showed best depths of from ~~15~~ to 19 feet."

In the report for 1878, "the outer bar near the entrance to the north channel, three miles west of line from Cape Disappointment and Point Adams, show greatest depth of 23 feet, which may be carried over it to deeper water of Baker's Bay. The bar in Chinook Spit channel has depths from 15 to 17 feet."

In the report for 1879, "23 feet may be carried over this bar (the north channel bar) into Baker's Bay. Chinook Spit channel is still shoaling. It was scraped during the year but without any decided gain of depth. Its bar shows channel depth from 14 to 15 feet."

In the report for 1880, "the bar in Chinook Spit channel extends along the entire eastern border of Sand Island. The channel depths upon it vary from 14 to 15 feet."

In the report for 1881, "20 feet of water is stated in the report of the survey to be the best depth which can be carried over the bar to Baker's Bay. * * * The bar in Chinook Spit channel has been filled to depths from 12 to 13 feet."

In the report of 1883, "Sand Island had been pushed farther north into Baker's Bay by the main channel and the inside channel into Baker's Bay has shoaled. The cut-off channel into Baker's Bay west of Sand Island showed tendencies toward shoaling. Peacock Spit was shoaling at its inner end and extending toward Sand Island."

In the report of 1885, "the northward movement of the main channel continued and Sand Island moved correspondingly into Baker's Bay. Baker's Bay had not shoaled materially. The inside channel east of

Sand Island had shoaled to 8 feet from the 16 foot depth of 1881, and the cut-off channel to 14 feet from 26 feet in 1881. Peacock Spit had shoaled in all directions going onto Sand Island on the east and the middle sands to the west."

In the report of 1887 and 1888: "No surveys or examinations were made in 1887 and 1888, but it was known from pilots and others that the north channel had ~~practically~~ disappeared and that the south channel had practically the same depth and locations as in 1886. Peacock Spit had joined completely to the middle sands, over which the depth was about the same as in 1885."

The former north channel had extended from its sea end into the river between Peacock Spit and the middle sands.

In the report for 1889, "At the time the survey was made the jetty had reached a length of about two and one-half miles, nearly all of which had been raised to or near low water level. * * * Peacock Spit showed a remarkable development, having shoaled to depth of about 5 feet for a distance of nearly two and one-half miles from Cape Disappointment. At this time it had in this direction its greatest known development in ~~length~~ Height. The east and west channels

into Baker's Bay had shoaled to 5 and 10 feet respectively, and were never afterward used by any but light draft vessels."

The reports epitomized in the appendix from which we have been quoting are not here produced for years later than 1889, because in that year the jetty was practically completed and ever thereafter effectually controlled the hydrography of the river.

The oral testimony of all the witnesses confirms these reports as to the shoaling of the channels north and east of Sand Island and the diversion of the waters of that channel south of said island.

> "The ruling depth of that channel (north and east of Sand Island) is about 3 feet at low water, this depth occurring near the head of Sand Island."

Testimony of G. B. Hegardt. Record pp. 96 and 97.

> "Q. What was the character of that water in there as to being shallow or otherwise?
> "A. Oh, it is very shallow now.
> "Q. About how shallow is it?
> "A. In an extreme low run out from the fort, a little rather, from Peacock Spit across to Sand Island, I think in the last big tide we had I could wade right across; I could wade from Chinook Beach clear to Fort Canby.
> "Q. What was the character of the water or the channel north of Sand Island and which is used by steamers going from Ilwaco to Astoria?
> "A. At the present time?

"Q. Yes.

"A. It is very shallow. A steamer of any draft, such as the regular steamer, the Nahcotta, and the Potter, has got to wait till toward high water.

"Q. Do you know what the draft of the Potter and Nahcotta is, how much water they draw?

"A. I don't know exactly; I think with a load on something like 10 feet."

Testimony of Daniel Markham. Record p. 133.

"Q. How long is it since ocean-going steamers have abandoned the use of the north channel?

"A. I have no recollection of any of them coming in since 1881 or 1882 at the latest.

"Q. What channel is now used by these ocean-going vessels in coming from the ocean to Astoria and the upper river?

"A. Why, what is termed as the south channel —the only channel.

"Q. Are you familiar with the channel at the present time north of Sand Island, between Ilwaco and Astoria?

"A. Yes, some.

"Q. Do you know what the depth of that channel at its shoalest point is, at low water?

"A. At one certain place at the east end of the island, I don't believe there is more than a foot or two at extreme low water."

Testimony of L. D. Williams. Record p. 137.

Witnesses for the defendant testified on the point in substance as follows:

Testimony of Captain H. P. Kindred:

"Ocean-going vessels cannot now pass north of Sand Island, north channel abandoned by sea-going and other vessels and steamers in 1878, or

somewhere along there. All the water north of Sand Island has been constantly getting more shoal for 20 years." Record pp. 226 and 227.

Captain P. E. Ferchen:

"The channel between Sand Island and the Washington shore cannot now be used by ocean-going vessels or steamers. Has not been so used for a number of years. The depth of the channel north of Sand Island at low tide is only 3 or 4 or 5 feet." Record p. 231.

Captain M. D. Staples:

"Where Sand Island used to be when I first came here you can tow ships now. You can't come into the channel now north of Sand Island with a tug boat. I should judge in low water the depth does not exceed three or four feet. I guess you can walk across there now in low water." Record p. 243.

Captain P. Jordan:

"You can walk from Sand Island to Chinook in low water." Record p. 266.

John H. Lewis:

"Channel north of Sand Island cannot be used by sea-going vessels. Ruling depths in that channel are 12, 14, 7, 5, 6, 4, 5, and then deeper." Record p. 275.

Robert Corruthers:

"The Indiana came in by the north channel in 1881 or 1882. I think she was the last deep loaded vessel to come in that way. Since that time it has been gradually shoaling up." Record p. 283.

C. S. Gunderson, Bar Pilot:

> "In 1882 the north channel was shoaling up, the south channel was closed, and we then went out—I know I had the pleasure of taking a very deep ship right out over what they call the Sands, right out west." Record p. 293.

Captain George Warren Wood:

> "Don't think channel north of Sand Island was used by sea-going vessels in the '80s, probably in the '70s." Record p. 324.
>
> "The channel north of Sand Island is substantially closed. I consider the channel that runs out to sea as the north channel." Record p. 326.
>
> "The channel north of Sand Island does not exceed three feet in depth." Record p. 328.

It seems to be established by these reports and the testimony of these witnesses beyond the possibility of contradiction, that for some time prior to 1881 some natural cause had induced a shoaling of the former channel, north and east of Sand Island, and that that cause had increased in intensity until that channel had decreased in depth from 19 feet in 1878 to 8 feet in 1885 and to 5 feet in 1889. That cause we submit is explained by the report of the Board of Engineers for 1882 (Record p. 24), where it is said that the scouring of the middle sands, caused the main volume of water south of Sand Island to cross the middle sands, with a depth of 21 feet of water, passing thence into the north bar channel west of Sand Island and thence

into the sea. That channel was after that date the channel from the river to the sea, and the waters had ceased to flow north of Sand Island, causing that channel to shoal and disappear. It is easy to see that this must have happened as the result of the pushing of Sand Island northward into Baker's Bay, thus giving opportunity for the entire volume of water flowing down the river, to attack the middle sands lying across its course and to cut a channel through them into the sea. There was a depth of water of 21 feet around to the north of Sand Island, through the Chinook channel, in 1854, and the same depth in 1868. That depth had decreased to 14 or 15 feet in 1880, to 12 or 13 feet in 1881, to 8 feet in 1885, and to 5 feet at its east end in 1889. It is manifest that from the cause indicated the channel had practically disappeared as a ship channel in 1881 and that the water which had formerly constituted it then began to flow into the sea south of Sand Island. The body of water flowing south of Sand Island before this change, had entered the sea through the old south bar channel. When the waters formerly flowing north of Sand Island were united to these which had always flowed south of it, the result of the combined force was to cut a channel through the middle sands into the old north bar channel making the cut-off and the north channel the main channel from

the river into the sea. This did not immediately obliterate the south bar channel, but the latter then commenced to shoal and it continued to shoal until it was finally cut off and obliterated by the building of the jetty. The single channel today, and ever since 1881, tracing it from the river to the sea, is the old south channel as far as the middle sands, that is, the old channel south of Sand Island, then a new channel cut through the middle sands due west until this channel intersects the old north channel west of Sand Island, and then through the old north channel to the sea.

It may be said that inside the river this channel is the old south channel, and judged solely by its position with reference to Sand Island, such a claim is correct. But judged by its relation to the channel out to the sea, it is a continuation of the channel from its sea end eastward, which this court has found was the channel fixed by the act of Congress as the boundary line, the old north channel. Looked at in another light it is a union of the two former channels. Webster's dictionary defines the term channel thus: "The bed of a stream of water, especially the deeper part of a river or bay where the main current flows." It will be seen that it takes two elements to constitute a channel, both a bed and a main current flowing through it, so that, while the bed of the channel south of Sand Island may

be that of the old south channel, the current flowing through it is both that of the old south channel and that of the old north channel. It may be assumed also, we think, that the bed is not entirely that of the old south channel, but that the increased flow of water therein caused by the diversion of the north channel, has increased it in width and depth, and to the extent of such increase, it is the bed of the old north channel. We think we were accurate when we said in our petition for a rehearing that "if this one channel has any characteristics which identifies it with one or the other of the old channels, it is more nearly the old north channel than it is the old south channel." It has the one important and distinguishing characteristic that it is joined to the old north bar channel, and following that channel in from the sea, it is, and has been since 1881, the only continuation of that channel.

Now what is the rule of law applicable to such a change in the position of a navigable channel which constitutes a boundary between states? There is no room for the application of the doctrine of avulsion. That doctrine applies only where the entire stream seeks a new bed. It has no application to changing channels within the original banks of the stream.

The true rule we submit is that the middle thread of

the channel must be followed wherever the channel may have shifted within the banks of the stream. This is the necessary deduction of all the cases decided by this court. We need cite none other than those referred to in the opinion of the court in the present case: Nebraska v. Iowa, 143 U. S. 359; Iowa v. Illinois, 147 U. S. 1; Missouri v. Nebraska, 196 U. S. 23; Louisiana v. Mississippi, 202 U. S. 1.

That this is the rule of international law as well, is shown by the following language of Dr. Twiss, quoted in the mid-channel case of Iowa v. Illinois, 147 U. S. 1-9:

> "Mr. Creasy also refers to the language of Dr. Twiss on the same subject, who observes that "Grotius and Vattel speak of the middle of the river as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable mid-channel. If there be more than one channel of a river, the deepest channel is the mid-channel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression in its bed. * * * The islands on either side of the mid-channel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the mid-channel of the river will not operate to deprive that nation of its possession, although the water-frontier line will follow the change of the mid-channel."

For the purpose of this case then we say the present channel running out to the sea south of Sand Island, is the north ship channel of the Columbia river, and is the boundary between Oregon and Washington.

What is the effect on Sand Island of the change of channel? It would appear from the quotations we have made from Dr. Twiss, that such a change is a channel constituting the boundary between independent states will not operate to deprive one of them of the possession of an island, separated from it by the mid-channel, as the result of the change, although he says the water line will follow the change of the mid-channel. But we submit that the reason of the rule, as applied to independent states, does not apply to states of the American Union. Titles, which are protected by the Constitution of the United States, would not be affected. The transfer of people to an alien government would not occur. None of the innumerable objections to a transfer which may be imagined as affecting independent states would exist as between two states of the Union. We can conceive of no good reason why the principle which causes a transfer of jurisdiction and sovereignty over the water and beds of the stream when the channel changes, should not, as between two states of the Union, apply as well to islands affected by such change.

But there are other reasons which take this island out of the class of islands referred to by Dr. Twiss and subject it to a different rule. This island we submit, in its relation to the two states, is governed by the principle laid down by the court in St. Louis v. Rutz, 138 U. S. 226. It is not an island in the ordinary acceptation of the term. This court in its opinion in this case says that it is little more than a sand bar. Its history shows it to be a mere mass of moving sand, similar in its character to Arsenal Island in the Mississippi river, which the court in St. Louis v. Rutz, described as "a mere moving mass of alluvial deposits."

The court in that case said further of that island, "to such a movable island traveling for more than a mile and from one shore to another, the law of title by accretion can have no application, for its progress is not imperceptible, in a legal sense." Arsenal Island in that case, which existed on the Missouri side of the line at the time of the admission into the Union of both Illinois and Missouri, had been eroded at its upper end and added to at its lower end, and as the result of this process had been forced down the river more than a mile and over to the Illinois side of the channel, the channel finally shifting as the result of this change of the island to the Missouri side of the island. The

facts of the case are very similar to those in this case. The court refused to apply the ordinary doctrine of accretion to the island, but held that the new land built up during its progress and growth, belonged to the owner of the bed of the stream on which it ultimately found itself. The court added: "We must not be understood as implying, that if an island in the Mississippi river remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change, because it might be at one time on one side and at another time on the other side of the boundary of the two states," a reservation very proper to be made with reference to private titles, and entirely in line with what we shall hereafter argue.

Three things appear to have been established by that case:

First. That such a mere moving mass is not an island in the ordinary acceptation.

Second. That the doctrine of accretion does not apply to it.

Third. That the encroachment of such an island, during its travels, on the soil of another state, cannot affect titles granted by the latter state. A necessary corollary of the last proposition is that such an

encroachment cannot change the sovereignty and jurisdiction of the latter state. Sovereignty and jurisdiction we have seen, may be changed by moving channels, but it is nowhere laid down that they may be changed by moving islands.

The doctrine laid down by this court in St Louis v. Rutz, although applied in the settlement of private titles, applies with added force, we conceive, to questions of sovereignty and jurisdiction as between states. The utmost that the State of Oregon can claim under the doctrine of St. Louis v. Rutz is so much of Sand Island as built up on her soil, which would limit her right to that part of Sand Island which built up prior to the change of channel in 1881. Where the northerly end of Sand Island was in 1881 cannot be definitely settled by any evidence in this case, but it may be approximately settled. The report of the Board of Engineers for the permanent improvement of the mouth of the Columbia river, dated October 13th, 1882, states that the island had then moved one and three-fourths miles northward from its position in 1841. Its position, we assume, was not further north in 1841 than in 1851. Now, Mr. G. B. Hegardt, an engineer officer in charge of the government work at the mouth of the Columbia river for nearly 20 years, and thoroughly familiar with the topography of the mouth of

the river, both from observation and from a study of the charts, testified that the Sand Island of 1851 was two and three-fourths miles south of the most southerly part of Sand Island as it exists at the present time. Record p. 91.

Between 1882 then, when the Board for the permanent improvement of the Columbia river reported that the island had moved one and three-fourths miles north since 1841, one mile off the south end of Sand Island had been eroded and the island had built up correspondingly on the north side. Most of it therefore must now be on what has always been the Washington side of the line. Some of it, but an inconsiderable part of it, is no doubt south of where the north channel was in 1881, but we make this statement with reserve, and subject to a survey should the progress of this case require one.

We submit, however, considering that Sand Island is little more than a mere mass of moving sand and not worthy to be dignified with the name of island, that we need not go into any very elaborate investigation to show its position at the various dates. It passed to Washington, we submit, on the change of channel, along with other parts of the bed of the Columbia river.

We do not conceive that the change of sovereignty over the island could in any manner impair the title of the United States to the island, if it received title by the cession of Oregon. If it did not receive title by that cession because the island was then and always had been on the Washington side, then its title as against the State of Washington was complete because the island had formed before the admission of Washington into the Union as a state. Farnham on Water and Water Rights, Vol. 1, p. 50.

THIRD

The stretch of river involving all the islands and sands in controversy excepting Sand Island, extends from the mouth of the river eastward up to Three Tree Point, a distance of approximately twenty-five miles. There are only two islands in the entire lot (Desdemona Sands and Snag Island), the remainder being entirely submerged and only visible at low tide.

The topography and hydrography of the stretch of river involved is shown on Washington's exhibits "H" and "I," to be found in the record, as also the topography and hydrography of the mouth of the river and the bar channels. The point on Washington's exhibit "I" designated "Yellow Bluffs," is sometimes referred to by witnesses as Harrington Point.

Desdemona Sands and Snag Island, the former being shown on Washington's exhibit "H" and the latter on Washington's exhibit "I," are the only grounds in controversy which are positively identified with reference to channels which complainant insists constitute the boundary on this stretch of the river. Should the Oregon line be sustained, it is admitted now that all the islands and sands in the stretch of river referred to are on the Oregon side of the line.

In determining the controversy as to these islands and sands up the river, it will be necessary to take up and construe portions of the act of 1859 not before considered by this court.

The language of the act now to be considered is as follows:

> "Thence easterly to and up the middle channel of said river, and where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla."

It cannot be supposed that there are three channels extending from the mouth of the river to Fort Walla Walla. Therefore the words "middle channel" cannot be given their literal meaning. It cannot be supposed that the north channel at the mouth of the river extends as far as Fort Walla Walla. Therefore, that channel, even if the court adheres to its former decision that

that channel is the one by which the line enters the mouth of the river, cannot be the dividing line east of Sand Island. What then is the meaning of the words "middle channel?" We submit that they mean the same thing as "mid-channel" or the middle of the main navigable channel of the river, and we conceive that this court, after examining the case of Iowa v. Illinois, *supra,* and the authorities there cited, will have little difficulty in agreeing with our contention. But the phraseology changes when the law comes to deal with stretches of the river which are divided by islands. Then the language is, "up the middle of the widest channel thereof." Even here there must be a channel, so that the law does not mean the widest expanse of water between shore and island. There must also be islands in the true sense, which means bodies of land surrounded by water and above water at all times; so that there is no room for the application of the term "widest channel" except where there are such islands.

We say, first, that the middle of the widest channel of the river may well be construed to mean the middle of the best channel of the river. Why should Congress adopt the main navigable channel of the river as the boundary between the two states throughout most of its course, and adopt a different rule for stretches of

the river which are divided by islands? What relation is there between widest channels, and the policy of the law which adopts channels as boundaries, unless it was supposed that widest channels would be the best channels and therefore the channels of traffic? Still, it must be admitted, in all candor, that in the law the term "middle channel" and "widest channel" appear to be used in opposition to each other and to mean different things. This opposition would be lessened by the interpolation of the words "of the" between the words "middle" and "channel" so as to make the law read, "up the middle of the channel," and this we believe is permissible, because it is evidently what the law-makers meant. Their minds being next directed to points in the river where there were islands, and to the possibility of two or more channels around them or between them, it would have been natural for them, although not technically accurate, to prescribe the widest channel in the sense of its being the best channel, as the one for the line to follow.

Our contention that the widest channel should be construed as the best or main channel, is reinforced by the language of the prior act of 1853 fixing the boundary between the then two territories. The channel there prescribed as the boundary is the "main channel of the Columbia

river." These laws are undoubtedly to be construed in *paria materia*, and since the later law is obscure in its terms, and no reason can be imagined for varying from the plain, unambiguous and scientifically accurate language of the prior law, we insist that a construction must be given the later law which will square it with the former. If this construction be adopted, it is easy to apply the evidence to the law and show that the channel contended for by complainant on the upper stretches of the river is the true boundary line between the two states.

But if "widest channel" is given its literal meaning, there must still be a channel as distinguished from mere expanse of shallow water or mere pockets in deep water, and to bring the rule of the widest channel into play there must be islands dividing the river, as distinguished from mere submerged sands.

We first direct our attention to the channel south of Desdemona Sands, shown on Washington exhibit "H," and we say that there never has been a time from 1859 down to the present day, when that channel has not been the main channel of the river at that point, the channel which commerce has followed. If any fact in this case is established by the testimony that fact is established.

The complainant in presenting its testimony on this point contented itself by proving by Edmund Jussen and G. B. Hegardt, both of them accomplished engineers, the latter having been assistant engineer in charge of the government work at the mouth of the river for more than twenty years, that the composite maps, Washington's exhibits "H" and "I" made by them, were accurate reproductions of the several maps issued by the government, commencing with that of 1851, and that according to those maps, their hydrography, topography, sailing directions, and aids to navigation marked thereon, such as beacons and buoys, the main navigable channel of the river inside the entrance of the river was now and always had been the line in red and marked in green on Washington's exhibit "H," "Channel line, 1851." This line ran to the south of Desdemona Sands. On the question of the continuance of the old north channel up along the north bank of the river, both of them testified that while there was deep water along the north bank as far up as Knappton, it dissipated itself in shoals and shallows immediately above that point, and that there never had been a channel for ocean-going vessels, along the north bank above Knappton.

That the so-called middle channel of the river, of which mention is made later on in the testimony of wit-

nesses for the defense, being a channel extending from the east end of Sand Island directly toward Tongue Point, and passing north of Desdemona Sands, did not exist in 1859 as shown by the hydrography of the maps, but first appeared on the map of 1870, and that where that channel appeared on the map of 1870 there appears on the map of 1851 a large area of sands marked "bare at low water."

Further that the said middle channel was not now and had never been of sufficient depth to admit the passage of ocean-going vessels and had never been so used.

On the question whether the deep water along the north bank could not have been continued eastward by dredging so as to make that as practicable a channel as the south channel, within which it appeared dredging has been done, the Witness Hegardt explained that to open the former channel would have required a channel to be dug for nearly three miles where depths were only 10 to 12 feet, while to keep the south channel open only required dredging to be done for one mile where the natural depth of water was 18 feet.

We ask the court to read the testimony of these witnesses in its entirety because it cannot be profitably abstracted. Testimony of G. B. Hegardt. Record pp.

80 to 120, 141, 183 to 184, 191 to 201. Testimony of Edmund Jussen. Record pp. 144 to 183.

Witnesses for the defense testified on that point in substance as follows:

Captain Cleveland Rockwell:

> "There was no channel north of Desdemona Sands. Never knew of ships taking that course except to go to Knappton. Ocean-going vessels going to Portland always passed to the south of Desdemona Sands. That was the commercial channel always." Record p. 209.

Captain P. E. Ferchen:

> "Vessels coming in from the open sea and going to Astoria and Portland pass south of Desdemona Sands. That was the usual course in 1856-7 and 8 and they have used it from that time until today." Record pp. 232, 233.
>
> "A ship that drew 13 or 14 feet going to Portland had to go to Astoria. A ten foot ship might get up on the other side." Record p. 234.
>
> "Since I have known anything about the river all ocean-going vessels passed close by Astoria on their way up the river. There was no other way. Never saw any ships following the Washington shore above Point Ellice." Record pp. 237 and 238.

Captain D. M. Staples:

> "Vessels have gone to Portland by way of Knappton but it is not the usual and customary way. It was only occasional vessels that went that way, and vessels of lighter draft. Vessels of heavier draft took the southerly channel past Fort Stevens, past Tansy Point and up here in front of

Astoria and up the river that way." Record pp. 241, 242.

"When I first began to come into the river with vessels (about 1867), the course was close to Cape Disappointment, then almost easterly past Sand Island, then southeast close to Fort Stevens, then along to Tansy Point and then up to Astoria." Record pp. 244, 245.

Captain A. C. Fisher:

"There is plenty of water in the north channel up to Point Ellice, up to Knappton was plenty of water and then it shoaled to 12 or 14 feet. There was a middle channel north of Desdemona Sands. There was a shoal in that channel a mile and a half wide abreast of Astoria." Record p. 252.

"Ocean-going vessels could not go to Portland by the north channel, deep draft vessels." Record p. 255.

"In 1865 the channel ordinarily used by vessels going to Portland came up close to Tongue Point and then up the Woody Island channel. That was the channel used in 1867 exclusively." Record p. 256.

Captain P. Jordan:

"Since 1885, since I have been on the river, the south channel has been the one that has been used almost exclusively, both before and after the dredging in that channel. It is known as the main ship channel. All vessels going to sea or coming from the sea to Portland, use what is known as the south channel and have done so during the time that I have been piloting. No one ever thinks of using the north channel only for small steamers; light draft vessels go through there." Record p. 264.

"The middle channel (north of Desdemona Sands) is not used by sea-going vessels. Never has been in all my experience." Record p. 266.

Captain John Pickernell:

"Have been on the river and boating since 1847. North channel (that up via Knappton) don't compare at all with the south channel, not nowadays, at all. I don't know as it was much better when I first knew it. There is good water in the north channel, then it is crooked and short places in it. From there on there are shoal places in it." Record pp. 268 and 269.

"If a steamer was going up to Portland and wanted to call at Knappton, it would go to Knappton and then come down the river and take the south channel to Portland. All these steamers going up the river use the south channel." Record pp. 269 and 270.

E. A. Beard:

"There was a channel through above Knappton on the north side, via Gray's Bay to a connection with the main channel at Harrington Point. The channel had 12 to 14 feet of water." Record p. 309.

"The middle channel north of Desdemona Sands was not considered one of the main channels. Light draft vessels used it; probably deeper ones could if necessary." Record p. 311.

"Vessels coming in from sea went south of Desdemona Sands. That was the route pursued practically by all ocean-going steamers." Record p. 312.

"None of the ocean-going steamers in going to Portland took the northerly route. They all pursued the south channel which carried them past Astoria and past Tongue Point." Record p. 313.

Captain George Warren Wood:

"Simpson Lumber Company vessels in 1868 used the north channel going to Portland. They loaded in San Francisco, brought their freight to Portland and then going down the river used to take the north channel instead of the Woody Island channel, going to Knappton to load lumber." Record p. 319.

"There was about 10 feet of water in that north channel." Record p. 320.

"I think the north channel could be kept open easier than the south channel." Record p. 321.

"Have navigated the river since '67 and '68. We followed the river up from Tongue Point through Woody Island channel." Record p. 329.

"The middle channel described by me was never used as the usual and customary channel of commerce. It was never buoyed." Record p. 331.

"The so-called middle channel might have been available for purposes of navigation in 1859, but it was never used." Record p. 332.

"In all the years I have been on the river vessels going to Portland used a course close to Tansy Point and Astoria. They did not use the north channel." Record p. 332.

"The ruling depth of the north channel from Chinook Point east would be 8 feet. It would take more dredging in the first instance to open that channel, but it could be kept open easier than the south channel." Record p. 333.

"Have known vessels going down river to take course marked on Washington's exhibit "I" as the Oregon line, but never going up. Vessels coming down and having no occasion to stop at Knappton always took the southern channel. The north channel was only pursued by vessels of light draft." Record p. 335.

Captain S. D. Adair:

"Ever since 1860 the main ship channel from

Portland to the sea, passed south of Desdemona Sands." Record p. 437.

Captain John W. Welch:

"Vessels coming in from the sea have not always gone south of Desdemona Sands. The middle channel has never had buoys or beacons on it. Vessels coming in would come around the cape and sail direct to Astoria." Record pp. 440, 441.

"It was along about the '50s that vessels pursued a course north of Desdemona Sands. There was nothing but very small vessels then." Record p. 441.

"I don't say that the government charts showing the channel south of Desdemona Sands were wrong, but that these vessels that came in—the small vessels that came in—came straight from the cape to Astoria." Record p. 442.

The foregoing constitute all the witnesses in the case on either side who testified concerning the so-called middle channel, and the channel pursued by ocean-going vessels, either north or south of Desdemona Sands, from the ocean up to Portland. While some of the witnesses for the defense, not all of them, thought there was a north channel up the river via Knappton, it was uniformly found, on cross-examination, that the so-called channel was shallow in spots, some of the witnesses fixing its ruling depth as low as 8 feet and some of them as high as 12 to 14 feet. All of them, however, without an exception, testified that ocean-going vessels passing from the sea up to Port-

land, from the earliest times down to the present time, had used the channel south of Desdemona Sands, and on, up that way, by Astoria and Tongue Point, to Portland. The unanimity of the witnesses on that point is really remarkable.

To the same effect we quote from the report of the Board of Engineers for the improvement of the mouth of the Columbia river, as follows:

> "Up stream from Point Adams there are much greater widths occupied by ~~streams~~ and numerous channels. All existing survey records show the Point Adams section occupied by two channels, between which lies the middle ground, whose down stream end, as shown by the 13 foot contour, is three-fourths of a mile below the Fort Stevens wharf and has not changed materially since 1868. Of these two channels the southerly or Fort Stevens channel has always been, so far as is known, the ship channel leading to Astoria and the upper river. The northerly or Chinook Point channel leads into many smaller ones that become lost in the shoals above." Record p. 50.

This testimony fixes Desdemona Sands as belonging to the State of Washington if the main channel, the best channel, the channel of commerce, be taken as the boundary line at the point on the river where Desdemona Sands are situated.

Counsel for defense, however, in some of their questions to witnesses indicated a view that the

widest channel at the point where Desdemona Sands are situated was the one on the Washington side, and to the north of Desdemona Sands, and that the rule of the widest channel governed at that point. If the court shall sustain our view that the widest channel means the best channel, then any such contention is foreclosed. If it shall not sustain that view then the contention that the channel north of Desdemona Sands is the widest channel involves these further questions, namely:

First. Is the deep water on the north side in fact a channel within the meaning of the law?

Second. Is that channel, as a matter of fact, wider than the channel south of Desdemona Sands?

Upon the first question we presented our views fully in the petition for a re-hearing.

Upon the last one, the question of fact, only one witness was interrogated. Counsel for defense asked Mr. G. B. Hegardt which of the two channels was the widest, that north of Desdemona Sands, or that south of them, and he replied, "the width of the channel north of Desdemona Sands, between 18 foot contours, and the channel just south of Desdemona Sands, between 18 foot contours, is practically the same." Record pp. 117, 118.

We proceed now to the question of the true line on the stretch of river shown by Washington's exhibit "I," from Tongue Point to Three Tree Point. Much of the testimony quoted concerning the first stretch of the river is applicable to this one and we shall not repeat that testimony here.

The 1859 line on Washington's exhibit "I" was placed there by Mr. Hegardt and Mr. Jussen as the result of the topography and hydrography of the maps prior to 1875, and the aids to navigation in the shape of buoys and beacons and sailing directions shown on said maps. They had no hesitation in testifying that the channel line marked on the map in red "1859 channel line," the one running through Woody Island channel to the south of Snag Island, was the only channel in use from the earliest times up to 1868 or 1869; that after that date for a number of years the channel used was the line marked "1875," "Cordell Channel," and that about 1882, as the result of dredging by the government and the port of Portland, down the north shore past Pillar rock, and as the result of further and continued dredging, from Yellow Bluffs in a southwesterly direction to Tongue Point, the channel marked "1905 channel line" had become established and had ever since remained the main channel of the river for commerce.

Mr. Hegardt further testified that the old south or Woody Island channel, had a natural depth of 18 feet and only required dredging of about one mile to put it in good condition. The north channel had depth of only 10 to 12 feet and would have required dredging to open it for three miles. Record p. 99.

The north channel above Point Ellice splits just beyond Point Ellice, one of the channels extending along the north bank about one mile east of Knappton where it is lost in the shoals. The other continues on up further out in the middle of the river, and also dies out about one mile east of Knappton. Same witness. Record pp. 105, 106.

Previous to 1867-8, the channel used for ships going up to Portland was what is known as the Woody Island channel as a matter of record. Same witness. Record p. 106.

In 1868 Cordell channel was discovered. That was followed until 1882 and then abandoned. That channel passes north of Snag Island. A jetty was built by the port of Portland commencing at Snag Island, the effect of which was to close Cordell channel and cause continued shoaling of Woody Island channel. Same witness. Record p. 107.

The natural flow of the current after it strikes Three

Tree Point is to pass down through Woody Island channel. Record p. 108.

Dredging has been done for the last 10 or 12 years from Jim Crow Point west, and north by Pillar rock, extensive dredging. The effect has been to maintain a channel north of Pillar rock. Previous to that time it went south through Woody Island channel and on down to Tongue Point. Same witness. Record pp. 118, 119.

Edmund Jussen:

> "The north channel ends at Knappton. No channel above there. A vessel at Knappton going up the river would have to retrace its course to the western end of Desdemona Sands, where it would find entrance into the south or main channel of the river." Record pp. 161, 162.
>
> "The natural flow of the water from Three Tree Point would be to follow the Woody Island channel. The effect of the jetty at Snag Island was to divide the flow, forcing a part along the Washington shore, and leaving only a part to come down through Woody Island channel." Record p. 167.
>
> "The deep water of the north channel terminated about a point south of Point Gray and opens up about 2 miles east." Record p. 173.
>
> "The present channel (1905 channel) above Tongue Point, was obtained by dredging, but no dredging was required to maintain the 1859 channel above that point." Record p. 177.

G. B. Hegardt:

> "The channel on Washington's exhibit "I,"

marked "1859 channel line" and "1875 channel line," was taken from a certified map of the Department at Washington, on which was shown the buoys and other aids to navigation. These buoys were marked on the certified copy of the chart by the authorities in Washington." Record p. 194.

"The dredging at Pillar rock was done for the purpose of increasing the depth of water passing through that channel, with a view of creating a strong scouring current. This naturally diverted a considerable amount of water from the 1859 channel." Record p. 195.

"Impossible for a vessel returning from Portland to come down via Knappton. Captain of vessel would not know where to go. I have had surveys made through here every year. It (the channel) would change every two or three months. He would not be able to take a steamer drawing 7 feet of water through it. A man who was actually engaged in these waters all the way down here, even in a difference of time of three months, would not know where he was going." Record p. 196.

Captain Cleveland Rockwell:

"Never knew of channel on Washington's exhibit "I" where Oregon has drawn its line. In 1868 the channel in use was this one, the Astoria channel right there by Tongue Point. They took this channel, the Woody Island channel, when I first came here. Woody Island channel was abandoned for the Cordell channel in '68 or '69." Record p. 210.

"I think the flow of water would naturally take the Woody Island channel from Three Tree Point. The natural effect of the Snag Island dike would be to back the water up on the Washington shore.

The dredging at Pillar rock would facilitate the flow of water in that channel." Record p. 211.

"If Captain Welch and other pilots have testified that they never took big vessels south of Snag Island, I should say that they were mistaken or had forgotten something." Record p. 211.

Witnesses for the defense testified on the point substantially as follows:

Captain A. C. Fisher:

"In those times (1865 and onward) a ship channel was on the south side of Snag Island, and a few years afterward it changed on the north side of Snag Island, around this way." (Pointing on the map.) Record p. 253.

"Ocean-going vessels could not go to Portland by the north channel, deep draft vessels." Record p. 255.

"In 1865 the channel ordinarily used by vessels going up to Portland came close to Tongue Point and then came up the Woody Island channel. That was the channel used in 1867 exclusively. It was used for preceding years as far as I have heard." Record p. 256.

"The channel from Tongue Point to Yellow Bluffs could not have been used unless it had been dredged. I think the Woody Island channel would have continued to be available if it had not been for the Snag Island jetty." Record p. 257.

Captain P. Jordan:

"Since I have been on the river, since 1865, the south channel has been the one that has been used almost exclusively, both before and after the dredging. It is known as the main ship channel. All vessels going to the sea or coming from the sea to Portland use that channel and have done so

since I have been piloting. No one ever thinks of using the north channel only for small steamers, light draft vessels go through there." Record p. 264.

E. A. Beard:

"The channel from Tongue Point to Three Tree Point ran through Woody Island channel for a number of years." Record pp. 312, 313.

Captain George Warren Wood:

"Navigated river in '67-8. We followed the river up from Tongue Point through Woody Island channel, south of Snag Island." Record p. 329.

"We used the channel through Woody Island for the deepest draft vessels for a number of years." Record p. 330.

"In all the years I have been on the river vessels going to Portland used a course close to Tansy Point and Astoria. They did not use the north channel." Record p. 332.

"The ruling depth of the north channel from Chinook Point east would be 8 feet." Record p. 333.

"The channel from Tongue Point to Yellow Bluffs was used for a number of years without dredging. Also the Woody Island channel. The presence of the Custom House at Astoria was not the only reason for the use of the southern channel." Record p. 341.

John Service, Fisherman:

"Neither Cordell nor Woody Island channel was used at that time ('83, '89 and '90). Cordell channel was the widest and best of the two." Record p. 405.

Captain A. L. Pease:

"Since my acquaintance with Woody Island channel (1876) it has never been used as a ship channel." Record p. 416.

H. Emken:

"Columbia river pilot since '68. We used the Woody Island and Cordell channels altogether in those days. I always went north of Snag Island." Record pp. 420, 421.

Captain J. W. Babbidge:

"From 1868 the bulk of commerce has gone north of Snag Island. Since '82 it has gone across to Yellow Bluffs. The Cordell channel was a better channel, a good deal, than the Snag Island or Woody Island channel, on the south side of Snag Island." Record pp. 428, 429.

Captain John Welch:

"About '60 they used the Woody Island channel. Prior to that Seabury and Latty and Packman used a channel across the river, but Bill Johnson and Hi Brown sounded out and foun l this inside channel and run up the inside of what was called Woody Island channel. They used that until Cordell channel was found." Record pp. 438, 439.

George Kaboth:

"Neither Woody Island channel nor Cordell channel has been used for commerce since 1882. The channel north of Snag Island was always considered the best." Record pp. 445, 446.

Captain W. A. Betts:

"Pilot since '81. When I first came here the

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channel was Cordell's, ran to the north of Snag Island. In '82 it changed and run around the Pillar rock channel. There was no channel from Tongue Point to Harrington Point prior to the time I came here. I have heard older hands say they went up the Woody Island channel." Record p. 449.

Captain W. H. Whitcome:

"Steamboat pilot and captain. Mate in '74. Since I recollect no vessels ever passed south of Snag Island." Record p. 448.

W. H. Patterson:

"Pilot on Columbia river for 25 or 30 years. Ever since I have been on the river the main channel has been between Pillar rock and Tongue Point." Record p. 462.

We have not duplicated the testimony with reference to the first stretch of the river and quoted with reference to that stretch, which also has application to that shown on Washington's exhibit "I," nor have we undertaken to quote all that witnesses have said, but we have quoted as much of what was said by each witness as is pertinent and strictly in point and the last word of the witness on the subject.

The only witness who speaks to any point at issue with reference to either stretch of the river, from whose testimony we have not quoted, is Mr. J. H. Lewis. Mr. Lewis was Oregon's expert engineer, and testified wholly with reference to deductions drawn

from the maps. His testimony was so tortuous and disingenuous, that it seemed a waste of time to attempt to follow it.

With reference to this last stretch of the river, it seems to be established by an overwhelming preponderance of the evidence that from the earliest times until about 1869, the 1859, or Woody Island channel, was the only channel used for deep draft ocean-going vessels; that that channel was a good channel having a ruling depth of 18 feet, and that the better channel of the present day, was only obtained as the result of the extensive dredging and other work done by the port of Portland and the government of the United States. We submit that the old Woody Island channel is the true boundary between the two states. It was so in 1859 and remained so until 1869. The action of the public authorities in diverting that channel cannot be permitted to have the effect of diverting the boundary line. Congress could not do that by enactment, and what Congress cannot do directly a mere engineer officer cannot do indirectly. If this position be sound, then Snag Island is on the Washington side of the line and belongs to Washington. The same thing is true of most of the submerged sands in controversy, although their location is not sufficiently fixed by the evidence,

with reference to the line, to enable us to identify them accurately. However, that does not seem material at this time. If the re-hearing be granted and Washington's contention as to the true line be then established, we understand it to be the practice that this court, on proper application, will order a survey to identify and fix, with reference to the line, all disputed points.

Respectfully submitted,

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Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1908

STATE OF WASHINGTON, Complainant,
v.
STATE OF OREGON, Defendant.

No. 3 Orig.
In Equity.

Brief on behalf of the State of Oregon, Defendant, on Re-hearing

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In the Supreme Court of the United States

OCTOBER TERM, 1908

STATE OF WASHINGTON, *Complainant,* v. STATE OF OREGON, *Defendant.*	In Equity.

Brief on behalf of the State of Oregon, Defendant, On Re-hearing

Complainant asks a re-hearing on two propositions. He alleges:

I.

"That there is no evidence to justify the court in treating the limited space existing today between Sand Island and the Washington shore as the 'North ship channel' of the Oregon enabling act of 1859," and therefore as a matter of law, the boundary must follow the waters of that channel, regardless of where they may have been diverted, or by what means.

Petition for re-hearing, page 3.

II.

That the court should have passed upon and construed the meaning of the last clause of section 2 of the act admitting Oregon, defining the boundary, said clause reading as follows:

"And where it is divided by islands, up the middle of the widest channel thereof," etc.

The decision of the court is so definite and so clearly based upon the testimony that it seems a waste of time to again refer to the matter, but the petition having been filed, we deem it our duty to discuss the points raised to the best of our ability and in the order mentioned above.

NORTH SHIP CHANNEL.

Petitioner contends that "when that channel (meaning the north channel) has been closed and the waters diverted elsewhere, one of two results follows as a matter of law. The waters which flowed through that channel, which created and constituted it, must be followed wherever they may have been diverted within the banks of the river, and still must be treated as the north ship channel; or the north ship channel must be treated as having ceased to exist, and on the doctrine of avulsion, the boundary between Oregon and Washington must be established on the line which that channel followed in 1859."

We believe the above is conclusively answered in Missouri *v.* Kentucky, 11 Wall. (U. S.) 395, which was a controversy over the ownership of an island in the Mississippi River. The island

was originally in the jurisdiction and territorial limits of Kentucky. The boundary was the main channel of the river, and the fact was clear that originally the main channel was on the west side of the island, and the Kentucky, or east side, channel was little used, being partially obstructed, and not so broad or deep; that later the Kentucky channel became the better channel and the one almost exclusively used by the boats passing up and down the river. The changes were the result of physical and hydraulic causes. The court held, page 401, that it was unnecessary in that suit to consider "whether on general principles, the middle of the channel of a navigable river, which divides coterminous States, is not the true boundary between them in the absence of express agreement to the contrary, for the reason that the treaty between France, Spain, and England, in 1763, stipulated that the boundary between the British and French territories on the continent of North America should be the 'middle of the River Mississippi,' and that the States of Kentucky and Missouri, being formed of a portion of such territory, were bound by the agreement."

In the case at bar, Congress, in the Oregon enabling act, 1859, fixed the boundary between the States, parties to this suit, at the point in controversy, in the middle of the north ship channel. The United States and the State of Oregon were the only sovereignties having any interest in the matter at that date, and the said act of Congress

is just as binding on States formed out of territory then owned by the Federal Government, as the aforesaid agreement was on Kentucky and Missouri. After referring to the said agreement in the Kentucky-Missouri case, the court says:

> "It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner."

Again in the case at bar the testimony shows beyond question that Sand Island was in the territorial limits of Oregon when the State was admitted into the Union. The cession of the island by the State to the United States in 1864, can be explained on no other theory, and it was always so considered, until long after the admission of Washington, and then for years undisputed. The fact that when Washington was admitted, the boundary was fixed in the "middle of the north ship channel," is an admission on the part of the State of Washington, that Sand Island was then (1889) in the territorial limits of Oregon. It will not be presumed that the officials and representatives of Washington, when they prepared their constitution did not know where the north

ship channel of the Columbia River was universally acknowledged to be; that they did not examine the Government charts of 1851 and 1854, or that they had not, in fact, known for years all about said channel. It is, therefore, we submit, conclusively proven that Washington not only was bound by the Oregon enabling act of 1859, but that by her legal representatives, and agents, she agreed that the boundary at the point in dispute was in the north channel, and that such agreement was ratified by the vote of the people in adopting her constitution. This being so, if the north ship channel had, as petitioner contends, so shoaled in 1889, that ocean-going vessels could neither enter nor depart from the river through it, then Washington practically agreed to the boundary being north of Sand Island, after the north channel had ceased to be a ship channel as far as large ships, or even those of moderate size, are concerned.

Further, the case under consideration is similar to the Kentucky-Missouri case in another aspect. It will be remembered that Sand Island "emerged into the open at all stages of water" long before Washington became a State. Mr. G. B. Hegardt, many years in the employ of the Federal Government, on the Columbia River, in the capacity of a civil engineer, and the principal witness for petitioner, says (record page 94), that the area of Sand Island *above high water*, as shown on Oregon's Exhibit No. 9 (sheet 1, chart of 1870)

is much greater than it was in 1854, and Captain C. S. Gunderson says (record page 302) that buildings have been maintained thereon since in the 80's, occupied by fishermen. While in early times it may be doubtful whether Sand Island was above high water at all seasons of the year, it cannot be questioned that it has been almost continually occupied by people actually living thereon for some time prior to the admission of Washington to the present time. Also, Captain Ferchern (record page 235) testifies that there are little trees growing on the island now. He does not say how large they are, but they must be of considerable size to be classified as trees, therefore must be of quite an age, even if not there in 1855, and there is no testimony to show that they were not there in 1889, when Washington was admitted. This case is, therefore, nearly on "all fours" with the Kentucky-Missouri case.

Also in that case the court holds that the changes in the river, shown on the map, page 409, of the report (11 Wall. U. S.), throwing the current from one side to the other, and finally sending it down the east side of the island, are important factors in deciding the true boundary at that point, and nearly the same state of facts exists in the case at bar. In that case, the river was subject to annual floods, when land on one side of the river would be washed away, and the other built up. In this case, the river is subject to annual floods (record page 120) and the evidence fails to show that the north channel was

not changed suddenly by one of those floods, to the south side of Sand Island, and had it not been for the construction of the jetty on the south shore, would, doubtless, have changed back long before this suit was commenced. Should the construction of a jetty changing the course of a channel change the boundary between States, and take an island out of one sovereignty and place it in another, when the natural washing away of the banks of a stream will not have that effect?

Petitioner complains that a portion of the bed of the river passes from the jurisdiction of Washington, under the decision sought to be reviewed. It must necessarily do so when the accretion is almost wholly to the island, but Washington loses nothing of importance thereby. While the island has built up on the north and narrowed and shoaled the channel, there is still a channel of from three to five feet in depth at low tide and from ten to fifteen feet at high tide, and the same is used daily for river steamers almost to the western end of the island, in running to the settlement on the north side of the river, near the coast. A well defined channel buoyed its entire length. The channel is not obliterated. When the north channel is fixed as the boundary line, as far as such boundary is concerned, it makes no difference whether it is the only channel or whether there are many others, the north is the one where the line is located, and if a little more than one-half of the waters flowing through said channel are for any cause diverted and run somewhere

else, so that a large portion of land is left on the side where the smaller amount of water remains, it should not change the sovereignty over such land. Such is not the doctrine laid down in the cases cited in complainant's original brief. If the main channel should finally cut through south of Astoria, and it may do so, and the greater portion of the waters formerly running through the north channel should pass south of Astoria, would that city become a part of the territory of Washington? Sand Island was a permanent fixture in the mouth of the Columbia River long prior to the admission of Washington, containing trees, buildings, and inhabitants, and the only change in its relation to Washington since 1889 is by accretions to its north shore, which, under the doctrine of this court (cases cited in briefs of both parties and in the decision sought to be reviewed) does not change the boundary except to crowd it a little closer to the other shore. The fact that the island has lost some land since 1889 by erosion on its south side, cannot affect the rule. There is no question that if the north channel had been the only channel in the river the line would only have approached nearer to the Washington shore. Further, a change in a channel caused by artificial means, such as the jetty on the south side of the river, or by dredging or digging a canal, ought not to be held to change an island from the territorial limits of one State to that of another. It will be remembered that the north channel was used for sea-going vessels, as

late as 1886. Captain Gunderson says (record page 293), vessels coming in would take a course north of Sand Island, and the jetty was commenced in 1885. The doctrine of accretion and change of boundary consequent thereby, as determined by the decisions of this court, cannot be invoked to change the ownership of islands in cases like the one at bar. Base *v.* Russel, *et al*, 86 Mo. 209. In the Nebraska-Iowa case, 143 U. S. 359, the court, at page 361, quotes, with apparent approval, from Vol. 8, Opinions of Attorney-General Cushing, to-wit:

"Whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconvenience, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression."

We submit, however, that the doctrine above announced does not operate to wrest from the jurisdiction of one sovereign and place it within that of another a large body of land, containing

at the time Washington was admitted, at least one thousand acres, and now much larger, and which has contained trees and buildings continually and inhabited much of the time. It is the same Sand Island it was in 1889, although it may have grown, and Washington made no pretense of a claim to it then. Buildings having remained on the island during this time, proves that the land under them has been permanent. A glance at Oregon's Exhibit 16 shows that the greater portion of the island as it existed in 1883, still remains intact. The lower area has washed away, but the main island is still there, and, no doubt, always will be.

* * *

Relative to the second proposition in the petition for re-hearing, we respectfully invite the court's attention to the fact that there are no islands shown to exist in or near the north channel of the Columbia River, after Sand Island is passed, within that portion of the river involved in this controversy. There are sand bars in or near the south channel, and a few in or near the north channel, partially bare at low water, but nothing coming within the definition of an island as the term is usually understood.

Petitioner says the first island, after passing Sand Island, is "Desdemona," meaning "Desdemona Sands." We have examined the testimony, and fail to discover any testimony showing that any portion of Desdemona Sands is ever bare at high tide. The maps or charts introduced in

evidence show it to be a sand bar partially bare at low water, and it is not within the north channel. All the other sands and so-called islands are similar, some of them, a very small portion, even, if any, bare at low tide, until we reach Snag Island, which is no where near the north channel.

In discussing the meaning of the clause of that portion of section 1 of the Oregon enabling act, defining the boundary, reading as follows: "Thence easterly, to and up the middle channel of said river, and, where it is divided by islands up the middle of the widest channel thereof," etc., petitioner evidently attempts to show that the widest channel is south of Snag Island, on the theory that the act means the widest deep water, but such, we submit, is not the true construction of the language employed. If the line starts as we maintain, and as the decision herein holds, in the north channel, then we contend it remains there, in the middle of said channel until we arrive at some point where the same is divided by islands, then up the widest channel, even if up the widest deep channel as petitioner urges, it does not bring its case within the rule it invokes. South of Snag Island, the ruling depth is not to exceed fourteen or fifteen feet, while north it is much more, and the width several times greater. We beg pardon for here reproducing a little of our former brief, but contend it sets forth the situation of Snag Island correctly, and shows conclusively that no ground exists for the contention that the line was ever by either State thought to

be south thereof. We say in said brief, pages 53 and 54:

"Referring to the maps of the date in existence when Oregon and Washington were admitted as States, we find the first island after passing Sand Island, at the mouth of the river to be Snag Island, about half way between Harrington Point and Jim Crow Point, shown on Oregon's Exhibits Nos. 8 and 14, and just north of where Cordell Channel unites with Woody Island Channel. A glance at the maps shows that at this point the widest channel is and always has been between Snag Island and the Washington shore, and that without reference to the depth of the water. The widest deep water is north of the island and it is one expanse of water from the island to the Washington shore, and since 1882, all ocean-going ships pass a long distance north of the island, and prior thereto most of them passed north, a few of the lighter draught going south for a year or two. Therefore, the boundary line at this point must be in a channel north of this island, and strengthens Oregon's position as hereinbefore outlined.

"Oregon's Exhibit 14 shows the relative distances from Snag Island to the U. S. meander line on the Washington shore and the U. S. meander lines on the Oregon shore, and shows the Washington shore to be several times farther than the Oregon shore. It is not reasonable to suppose that Oregon's representatives would have consented to the designation of a boundary line which would have left the islands along her shores under the jurisdiction of another State, and when they examined the map of 1851 and saw that there was no middle channel until Point Ellice was reached, the language used in the boundary was

considered sufficiently definite, and when we take that chart, Oregon's Exhibit No. 4 (Plate III herein) and examine it closely and remember that Congress must have secured its information relative to the river therefrom, it is easy to determine where the line was intended to be fixed. In the navigation of the Columbia River up to about 1883, it must be remembered, as the testimony fully establishes, that no large vessels were used, even those making trips to San Francisco, or other points in the coast trade, were of sufficiently light draught to pass through any channel which would lead to their destination.

"Another circumstance strengthens Oregon's position, that the boundary was never considered by either Washington or Oregon to be elsewhere than north of Snag Island, and that is that Snag Island was sold by the State of Oregon to J. W. & V. Cook by deed dated December 10, 1877, which deed is set forth in the abstract of record herein at pages 351 and 352, and Oregon has since its admission as a State exercised jurisdiction over the same, while Washington has never given a deed or lease thereof to any person whomsoever, nor levied taxes thereon, nor in any way attempted to exercise jurisdiction over the same, and when Washington was admitted (1889), all ships of every kind passed along the Washington shore from Yellow Bluffs easterly towards Portland, regardless of how they reached Yellow Bluffs, and could not possibly have passed through Woody Island or Cordell Channels, and said channels were closed to sea-going vessels long prior to that time."

However, as the decision herein aptly says, no state of facts is shown in this case to call for a

construction of the clause of the Oregon enabling act above quoted. We wish to call attention to a misconstruction by the petitioner of the evidence relative to the jetty at Snag Island. It was not intended to block the flow of water south of the island, but to create a good channel there, by throwing the main body of water through that channel, but it failed of its purpose, and it is very doubtful if it had any appreciable effect on either channel, although some of the witnesses were of the opinion that it did. Mr. Edmund Jussen, a witness for complainant, testified (record page 186):

"Q. The object in constructing that jetty was to increase the depth of the water in the Woody Island Channel, was it not?

"A. Yes sir."

The object for which that jetty was constructed was to make a good south channel, but the attempt was a failure, and afterwards the north channel was somewhat improved by dredging.

Here we wish to call attention to petitioner's statement, at pages 19 and 20 of petition for rehearing, reading as follows:

"We deem it proper to say in this connection, however, that the map referred to in the opinion as Chart A, is the reproduction of a colored map which, so far as we can ascertain, never was introduced in evidence, but was simply used by counsel for the defendant to illustrate his argument. The original of this map cannot now be found among the files in the case. We are informed that it was withdrawn by counsel for the

reason that it was not an exhibit in the case. In some particulars the map is misleading."

We do not believe counsel intends to mislead or to misstate the facts, but that memory has been playing him fantastic tricks, for "Chart A," referred to in the opinion, is Oregon's Exhibit No. 4, being Government Chart of 1851, and was simply colored to more distinctly show the different depths of water and channels and their relation to each other. The colored one was used, as petitioner says, to illustrate or explain the testimony and for the reason that the channels stand forth so much plainer. The original was not colored for the reason that it had been introduced in evidence before the idea to color the same was suggested, and such original has never been withdrawn. Complainant's counsel had the use of the colored chart at all times, even when preparing petition for re-hearing. When in Washington, before the Supreme Court, in the case of Christ Nielsen *v.* Oregon, defendant's counsel was informed by the clerk of the court that there were two maps he could have by signing a receipt for the same, which counsel did, and received the maps, one being the colored chart. Counsel for petitioner wrote for same, saying he wanted it in preparing petition for re-hearing, and it was immediately forwarded to him, and again returned to defendant's counsel after the petition herein was filed. We apologize for reciting these facts, but justify by pleading the veiled insinuation in the petition, which we deem unwarranted.

Petitioner insists that the court misconceived the facts, but does not controvert the propositions of law announced by the court in its opinion herein. We submit that the physical facts relative to Sand Island, heretofore referred to, renders impossible the application of any other rule than that of the Kentucky-Missouri case, and the facts relative to Snag Island, its location, the main ship channel always having been near the north shore, the same being the north ship channel, called for in the enabling act of Oregon, and the Constitution of Washington, and it being the widest channel as well as the north ship channel, and the further fact that since long prior to the admission of Washington, no attempt has been made to use the so-called Woody Island Channel, but that the same was abandoned in 1881 or 1882 (record page 107), and that large vessels never used the same, considered with the history and surrounding circumstances preclude all suggestion of a misconception of the facts by the court, and we respectfully submit that no re-hearing should be granted herein.

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No. 4 Original

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Briefs.